INDEX TO EXHIBIT "A-A"

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PLAINTIFF'S RENEWAL

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PLAINTIFF'S DOCUMENTARY EVIDENCE

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In the Supreme Court of the United States

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Error to the Circuit Court of the United States for the Northern District of Ohio, Western Division.

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CASE STATED

Company is a railroad railroad corporation created under the laws of the State of Ohio and Michigan, composed of said Monitor Railway Company and the Ohio and Michigan Railway Company, a corporation created under the laws of the State of Michigan, the line of whose railroad was then in process of construction in the State of Michigan to the same point in the boundary line in the State of Ohio and Michigan as the line of said Monitor Railway Company. That on the 1st of June, 1871, said two railroad companies were duly consolidated, and became one railroad corporation under the laws of Ohio and Michigan, under the corporate name of the Toledo, Cincinnati and Lake Michigan Railroad Company.

The petition further avers, that on the 19th, 1871, the plaintiffs, John Sisty, S. C. Dee and F. M. Hutchinson, as the copartnership name of Sisty, Dee & Co., entered into a contract in writing with the Monitor Railway Company [this corporation] by which they undertook, among other things, to build, locate and furnish cross-ties for the main line of the road of said company, a distance of 125 miles; also to build, bridge and furnish cross-ties for, and form the branch of said main line, extending from Ellis, through Toledo to the State line of Michigan, a distance of about forty-seven miles.

It was further alleged that certain plans, specifications and profiles, with accompanying estimate of quantities of grading, cutting, filling, etc., were exhibited to plaintiffs, and other bidders for said contract as a basis for the same. That upon the execution of said contract, plaintiffs agreed with said Railway Company [this corporation] to receive from it the sum of $8,500, in cash per mile for the work in line of $8,500, as provided in the written contract, leaving the whole consideration $8,500 per mile; that upon the same day Robert Wilkins became a member of the firm. That said contract was made in anticipation of said consolidation, which was effected before any work was done thereunder, and the consolidated company assumed said contract, and undertook to fulfill the same as defendants on the part of said Railway Company; all transactions thereunder from June 1, 1871, were actually had with the consolidated company.

It was further stated that the plaintiffs proceeded with the performance of the contract upon their part, until September 7, 1871, before which time it was discovered that various of the estimates of quantities of grading, etc., accompanying the original plans and profiles, were too small in amount to meet the requirements of the road as contemplated to be built in said contract, and as required by the Chief Engineer of the Railroad [consolidated] Company; that said increase of work over said original estimate required a large amount of extra work and materials over and above the amount required by the original contract; that plaintiffs declined to perform said extra work without compensation, and defendant Railroad [consolidated] Company agreed to pay plaintiffs a fair and reasonable price for any extra work they might do; that thereafter plaintiffs continued to perform all things required of them by said contract, and also extra and increased work, up to and until June 30, 1872, when plaintiffs and said defendant entered into the contract of release therein attached by copy, by the terms of which, among other things, said defendant released plaintiffs from obligation to perform all that part of the work required by said contract, situated between the terminal point of the curve of the Detroit and Michigan Railroad and the State line of Michigan, toward Toledo, a distance of about seven miles; that after the execution of said release the plaintiffs continued to perform the things required of them by said contract remaining to be performed, and said extra

$513,187.97. Judgment was demanded against the defendants for the sum of $415,759.29, with interest from June 1, 1872.

The answer of defendant *Railroad* [consolidated] Company with the exhibits attached, occupies the printed record from pages 42 to 51 inclusive. The first defence contained an objection to the jurisdiction. The second defence alleged a defect of parties plaintiff, in this, that Willard S. Hickox was jointly interested with the plaintiffs in all the matters and things set forth in the petition; that he was a partner with the plaintiffs, and as a member of the firm of Swan, Rose & Co., was the owner of an undivided one-fourth part of all the alleged causes of action in the petition set forth. Said defence also alleged that McMann, another of the partners, had gone into bankruptcy, and that one Stephen R. Sturges had been made his assignee, and was a necessary party. Defence number three set out that at the time of the making of the contracts in the petition mentioned, and at the time of the commencement of this suit, the firm of Swan, Rose & Co. was composed of John Swan, S. C. Rose, F. M. Hutchinson, Willard S. Hickox, and Robert McMann; that the construction contract mentioned in the petition was made in anticipation of the consolidation, and all transactions thereunder were after said consolidation; that defendant paid Swan, Rose & Co. the sum of $514,783.65 upon the work performed under said contract upon the basis of $4,250 per mile in cash. All allegations in the petition not specially admitted, were denied.

The fourth defence alleged that prior to and at the time of the execution of the written contract in the petition mentioned, Willard S. Hickox was the president of the Railway Company, and so continued until the work was abandoned by the plaintiffs; that about May 7, 1871, said John Swan and F. M. Hutchinson proposed to defendants to do all the work and furnish all the materials mentioned in said written contract at the agreed price and compensation to be paid by defendants of $4,250 per mile in cash, and $2,000 per mile in the stock of said railway company at par; that this proposition was then accepted by the company; but before the signing of the written contract and while said Hickox was holding said position of trust, he fraudulently and corruptly conspired and colluded with said Swan and Hutchinson and said S. C. Rose, for the purpose of cheating and defrauding defendant; and for the fraudulent purpose of adding to said contract price and materials an amount over and above a fair compensation therefor which should belong to said Hickox, he fraudulently procured the additional sum of $250 per mile to be inserted in said written contract, and procured the signing of the same by defendant, with the agreement between said Hickox and said Swan, Rose & Co. that said additional sum should belong to said Hickox as part of the profits of said contract; that as a part of the same transaction, and at the same time, in pursuance of said corrupt and fraudulent agreement, said Swan, Rose & Co. assigned all their right to, and interest in said $250 per mile to said Hickox; which agreement and fraudulent collusion was unknown to defendant until plaintiffs abandoned said work.

This defence further shows, that on the 10th day of June, 1872, with the approval and consent of said Swan, Rose & Co., a contract was entered into between the Toledo, Tiffin and Eastern Railroad Company, and defendant, and the Pennsylvania Company, by which Swan, Rose & Co. were released from the performance of the work of construction of said railroad from the tangent point of the curve of the Dayton and Michigan Railroad to the State line of Ohio and Michigan, a distance of about seven linear miles; the plaintiffs consented thereto by written endorsement upon the back

of said contract, a copy of which is made part of the answer; that the work so released, and which plaintiffs did not perform, was equal in quantity of work and total value of the work to have been performed, to forty-one average miles of said railroad; and would have cost plaintiffs over $[illegible] to construct the same as stipulated in the original contract; said work included the building of a bridge over the Monongahela River; said changes were duly executed to by all the parties in interest.

Defendant averred that the pretended contract of release set out in the petition was never executed or entered into by defendant; that said Hitchcock had no authority to make the same on behalf of defendant; that the same was fraudulently and corruptly made by said Hitchcock while he was fraudulently interested jointly with the plaintiffs, against defendant, in the profits of said contract; that said pretended contract and the contracts thereof, were by plaintiffs and said Hitchcock kept secret and concealed from defendant until plaintiffs had abandoned said work; that after the making of the original contract, and until the plaintiffs abandoned the work, all the monthly estimates of work performed by plaintiffs thereunder, were made by averaging the whole amount of work to be done by plaintiffs under the contract, at the contract price, and ascertaining the proportion which the work performed each month bore to the whole amount to be performed; that the manner of ascertaining the proportionate amount of each payments, as well as the proportionate amount of stock payments earned by plaintiffs, each month, was agreed upon as the basis aforesaid, between plaintiffs and defendant; that the amount of cash payments so ascertained was paid by defendants and accepted by plaintiffs, and certificates showing the amount of stock payments so ascertained as earned each month upon said basis, were delivered to and accepted, and are still retained by plaintiffs; that said estimates were made and paid by defendants without any part of the work having been accepted or approved by the engineer of the Pennsylvania Company; and defendant, from time to time, at the request of plaintiffs, and upon their representations that it was necessary to enable plaintiffs to pay their subcontractors, and to keep the work in progress, paid plaintiffs large sums in excess of the amounts found due as earned by plaintiffs for work performed; that defendant has paid Swan, Rose & Co., in all, the sum of $514,782.65, in cash for work performed under said contract; that no demand has ever been made by plaintiffs for any stock on account of said work.

In the fifth defense the defendant alleged that certain persons therein named had performed labor and furnished materials for and under Swan, Rose & Co. as subcontractors and laborers; these claims are set out in detail, and amount to nearly $25,000; other liens are set forth showing that these claims had become liens, under the Statutes of Ohio, upon any funds in the hands of the Railroad Company due to Swan, Rose & Co.

The sixth division of the answer set up a counter claim in behalf of the Railroad Company against the plaintiffs, to the amount of $[illegible] for damages sustained by reason of failure on the part of plaintiffs to build fences along the branch line of railway and to complete said branch as required by the contract.

Divers motions were interposed and acted upon during the progress of the case not necessary to be mentioned here.

The Railroad [consolidated] Company filed an amendment to its answer which is set out in the record, pages 52 and 53. The amendment set forth that the Railroad [Ohio] Company became consolidated with and merged in

defendant company as in the petition alleged; that on May 20, [10th.] 1871, a board of directors for said Railroad Company was duly elected and qualified, and annually thereafter a board of directors for said Company was duly elected in the month of January each year; that no labor was performed for said Railway [Ohio] Company by plaintiffs under any of the contracts mentioned in the petition; that the labor performed and materials furnished by plaintiffs, was performed and furnished for defendant Railroad [consolidated] Company; that said Railway [Ohio] Company ceased to exist May 20, [10th.] 1871; and no officers or directors of said Railway Company have been elected, or qualified, or acted since that date.

At the February term, 1875, of the Common Pleas, a default was taken against the Railway [Ohio] Company, and the case continued as to that Company to February 24th, 1875, for the assessment of damages by a jury. (Rec. p. 52.)

On February 24th, 1875, damages were assessed by a jury against the Railway [Ohio] Company, to the amount of $483,220.17. Judgment was rendered upon this verdict. (Rec., 53.)

Stephen R. Sturges, assignee in bankruptcy of Robert McMann, having refused to unite as a plaintiff in the action, was brought in as a defendant by summons. (Rec., 56.)

The Reply of the plaintiffs to the answer of the Railroad [consolidated] Company, is contained in the record, pages 56 to 61 inclusive. It denies the statements contained in the first division of the answer. As to the second division, it denies that Hickox was ever interested with the plaintiffs, in any manner in any of the alleged causes of action set forth in the petition, or in any of the profits that might accrue under said contract. In the Reply to the third division of the answer these denials are reiterated; also that any greater sum had been paid them than that alleged in the petition.

As to the fourth division of the answer the plaintiffs denied that Swan and Hutchinson proposed to do the work and furnish the materials for $4,250 per mile in cash and $2,000 per mile in the stock of the Company at par; or that any such proposition was accepted; or that Hickox at any time colluded with plaintiffs, or in any manner agreed with plaintiffs to increase the price to be paid plaintiffs in cash from $4,250 per mile to $4,500 per mile; or that said increase was to be inserted in said written contract with the intent that it should belong to Hickox, or with any other intent or purpose. They averred the facts to be that they proposed to the Railway Company to do the work and furnish the materials mentioned in the written contract at the price of $4,500 per mile in cash and $2,000 in stock of the Company at its par value; that this proposition was accepted by the Company; and thereupon the Company and Swan, Rose & Co. executed the written contract; that upon the execution of the contract, Hickox, on behalf of the board of directors of the Railway Company, and in presence of several members of the board, applied to plaintiffs for their consent and agreement to take and receive under said contract the sum of $4,250 per mile cash in lieu of $4,500, per mile cash for said work, alleging to plaintiffs as a reason for said application that the board of directors had no other way of providing for or reimbursing themselves for the expenses already then by them personally incurred, and thereafter necessary and proposed by them to be incurred in the prosecution by them of the enterprise of building said road; that thereupon plaintiffs acceded to said application, and agreed to receive said sum of $4,250 per mile in cash in lieu of $4,500 per mile cash for such work and materials as were stipulated for in said proposition and acceptance

and in said written contract; that plaintiffs executed a paper consenting to such application, with great reluctance, and were only induced to do so because they believed the facts to be as represented by Hickox and other members of the board of directors in reference to the heavy expense the board had been at personally, and were thereafter to be at in promoting the enterprise of building the road, and because they also believed they could still make a profit on the contract at the reduced compensation; and still more because they believed that unless they consented to said reduction, the prosecution of said enterprise would be crippled by the unwillingness of the board to prosecute it with energy at their further continued personal liability and expense; they denied that they had transferred any sum, or interest in any sum other than as above stated, by consenting to said application of $250 per mile cash rebated from said proposition, acceptance and contract price. They denied all fraud, collusion or conspiracy; or that the price proposed and fixed for the work and materials was excessive.

The plaintiffs also denied that the about seven linear miles of said contract work from the tangent point of the Dayton and Michigan road into and through Toledo to the State line of Michigan, by them not performed, and from the performance of which they were released by the defendant Railroad Company, was equal in *quantity* of work and total value of the work to have been performed thereon, to forty-one average miles of said railroad; or that the work so released would have cost the plaintiffs at the contract price over $256,250. They denied that release "E," attached to the petition was never executed by the Railroad Company; or that Hickox had no authority to make the same on behalf of the Company; or that the same was fraudulently made; or that Hickox was interested therein; or that it was kept concealed from defendant; or that the contract "O," set forth in the answer was correctly stated. As to the release of the (so-called) Toledo work, they averred that the Pennsylvania Company, previous to June 10, 1872, being then lessee of defendants' road, and intending to iron and operate the same, determined that said about seven miles of said work, agreed to be built by plaintiffs, including the bridge over the Maumee River, would not be satisfactory to the Pennsylvania Company, and entered into an agreement with the defendant Railroad Company and the Toledo, Tiffin and Eastern Railroad Company to build said portion of said road upon a different route; that plaintiffs consented to this agreement in terms similar to those contained in exhibit "O" of the answer; that by said consent plaintiffs only released to defendant their right under said contract to build said about seven linear miles of road, and expressly stipulated in said consent that it should have no other effect, nor otherwise change or modify their original contract; that the about seven miles of work so released would have cost plaintiffs a considerably greater sum to build than the price under said contract of the average seven miles of the whole work to be done under the contract, and therefore defendant applied to plaintiffs to release from the price to be paid for the whole work such a sum as they could agree upon as a fair equivalent for such release; that thereupon they agreed upon the terms set forth in release attached to the petition as exhibit "E"; that no other contract was made with reference to the release of the Toledo work. The plaintiffs also denied that the cash payments were made and accepted as in the answer alleged; or that certificates showing the amount of stock earned, were delivered to or accepted by plaintiffs; or that estimates were made or paid without the approval of the engineer of the Pennsylvania Company; or that no part of the work was not completed to the acceptance of such engineer; or that payments were made in excess of the sums earned; or that they had made no demand of the stock claimed to be due.

They also denied each and every allegation contained in the fifth and sixth divisions of the answer.

For reply to the averments of the amendment to the answer, they denied that the Railway [Ohio] Company, had ever been merged in the Railroad [consolidated] Company; or that said Railway Company had ever ceased to exist; or that since May 20, 1871, no officers or directors of said Railway Company had acted or been qualified.

The issues being thus made up, the case was, at the May term, 1875, of said Court of Common Pleas, referred to three Referees, under the Statutes of Ohio, to hear and determine the issues of law and fact between the plaintiffs and the Railroad [consolidated] Company. (Rec., p. 62.)

The report of the Referees occupies pages 62 to 80 inclusive, of the record. It bears date November 29, 1875, and finds a cash balance due from the Railroad [consolidated] Company to the plaintiffs, at that date, of $141,-181 65. It also finds due the plaintiffs for stock, the further sum of $35,-544.46. (Rec., p. 80.) But that under the pleadings the plaintiffs were not entitled to judgment for the amount found due for the stock.

Judgment was rendered upon this report by the Court of Common Pleas, at its May Term, 1876, against the Railroad [consolidated] Company for the sum of $144,294.43 and costs. The Court also found that the plaintiffs were entitled to a certain amount of stock.

Both these judgments were carried to the District Court of Fulton County, by petitions in error, and both were reversed by that Court at its March Term, 1878, and the case remanded to the Common Pleas for further proceedings. (Rec , pp. 82–83.)

At the June Term, 1878, of the Common Pleas, the plaintiffs took leave to amend their petition. The amendment is contained in the record, pages 84-85. It suggests the death of Stephen C. Rose, and makes his administrator, Lester E. Rose, party plaintiff in his stead. It also avers that the work done and materials furnished the Railroad [consolidated] Company in building the railroad set forth, under the contract set forth, and the special request and agreement as to extra work set forth, were done and furnished by plaintiffs for, and to the defendant Railroad Company [consolidated] at its request, and by and with its full knowledge, approbation and consent, and for its benefit; that said work, labor and materials were of the value of the sum of $928,947.26; which sum the said defendant then justly owed the plaintiffs, less only the sum of $513,187.97, which sum said defendant had theretofore, paid plaintiffs thereon, leaving due $415,759.29, with interest from June 1, 1882. The amendment further averred a demand of payment about October 23, 1872.

A motion was made by the consolidated company to strike from this amendment as irrelevant so much thereof as states the value of the work and materials furnished. A motion was also made by the same company for judgment in favor of the defendant upon the pleadings. Both these motions were overruled, and the defendant excepted. (Rec., pp. 85–87.)

The consolidated company answered the amended petition August 21, 1878. (Rec., pp. 87–88.) In this answer the Company adopted all and singular the averments of its original answer. For further answer it alleged that no meeting of the stockholders of the Railway Company or of the Railroad Company was ever called by the directors of either of said Companies, or by any other authority, for the purpose of voting upon the question of aiding any other railroad company in the construction of its road, or

of leasing, or operating the line of any other company; that no such meeting of stockholders was ever held; that the stockholders of neither of said companies by a vote of two-thirds of its stock represented at any such meeting, or by any vote whatever, ever assented to any agreement to so assist any other railroad company; that the contracts set forth in the petition for constructing lines of railway of other railroad companies, were made upon the sole authority of the directors, and for that reason were illegal and void.

The answer admitted a demand for a certain sum of money claimed by the plaintiffs, but denied that any other demand had ever been made; all allegations of the amended petition not specifically admitted or denied, were also denied.

In their reply to this answer, the plaintiffs alleged that the defendant adopted, acted upon and ratified the original contract set forth in the petition, as the same had been changed in respect to the contract price. They averred substantial performance on their part, and part payment by defendant; they also denied each and every allegation of the answer to the amended petition. (Rec., p. 89.)

On the 28th of October, 1879, an answer was filed in the Common Pleas in the name and behalf of the Railway [Ohio] Company. It is set out in the record, pages 92 to 97, inclusive. It adopts, in substance, the answer of the Railroad Company; but it sets up as a further defence to the cause of action contained in the amended petition, the six years' limitation under the Statutes of Ohio.

At the same time petitions and bonds were filed by the defendants for the removal of the cause into the Circuit Court of the United States for the Northern District of Ohio, Western Division. (Rec., pp. 97–102.) The Common Pleas accepted the bonds, and ordered the cause to be removed as prayed (Rec.. p. 103.) The record was duly filed in the Circuit Court, and the appearance of defendants entered. (Rec., p. 104.) A motion by the plaintiffs to remand the cause was overruled. (Rec., 105.)

On the 9th of June, 1881, the plaintiffs filed a reply to the answer of the Railway [Ohio] Company, in which all the material allegations of the answer were denied. (Rec., p. 106.)

The case was tried to a jury at the June term, 1881, of the Circuit Court. (Rec., pp. 106–9.) It resulted in a verdict in favor of the plaintiffs against the Railway [Ohio] Company and the Railroad [consolidated] Company, jointly, for the sum of $238,116.18, of which amount the jury found $35,339.10, to be the money value of $254,000, of stock earned by the plaintiffs. The jury also found for the plaintiffs against the Railroad [consolidated] Company, an additional sum of $116,468.32, for extra work. (Rec., p. 109.)

Separate motions for a new trial and in arrest of judgment were made in behalf of the two companies. These were overruled, and judgment rendered on the verdict. (Rec., pp. 109–112.) The judgment was against the two defendants jointly for the sum of $238,116.18, and against the consolidated company for the further sum of $116,468.32. The defendants excepted to the overruling of the motions for a new trial and in arrest of judgment. (Rec., p. 112.) A bill of exceptions was also taken and made part of the record, embodying all the testimony given in the case. It occupies pages 113 to 852 inclusive, of the printed record.

On the trial of the case, and before any evidence had been given to the

jury, counsel for the Railway [Ohio] Company, objected to any evidence being given as against that company, on the ground that no cause of action was shown against it by the petition as amended. This objection was overruled by the court, to which ruling the said defendant excepted. (Rec., pp. 113–114.)

While the plaintiffs were giving as part of their evidence-in-chief, the testimony of certain witnesses, the defendants severally, by their counsel, objected to certain portions of it as irrelevant and incompetent. The court overruled each of these objections, and permitted all the testimony objected to to be read to the jury, reserving to itself the right thereafter to rule from the jury any part of the testimony which it might deem irrelevant or incompetent. To each of these rulings as made, the defendants severally, by their counsel, excepted. (Rec., p. 114.)

The plaintiffs also offered as part of their evidence-in-chief certain profiles which are attached to and made part of the bill of exceptions. The defendants severally objected to the introduction of these profiles, on the ground that they were irrelevant and incompetent. The objections were overruled, and the testimony admitted, to which ruling the defendants severally excepted. (Rec., p. 114.)

The plaintiffs also offered in evidence certain letters attached to and made part of the bill of exceptions. Each of these letters was objected to as offered, by the defendants severally, as irrelevant and incompetent; but they were all admitted, and the defendants severally excepted. (Rec., p. 115.)

The plaintiffs also offered in evidence, in connection with the testimony of one Norman D. Andrews the original of the paper attached to the petition as exhibit "F." This was objected to, but was admitted, and the defendants excepted. (Rec., p. 115.)

They also offered in evidence, in connection with the testimony of one Lester E. Rose, the paper attached to the petition as exhibit "H." This was objected to, but was admitted, and the defendants excepted. (Rec., p. 115.)

They also offered in evidence the original paper, a copy of which is attached to the petition as exhibit "E." This was objected to, but was admitted, and the defendants excepted. (Rec., p. 115.)

They also offered in evidence certain testimony given by John Swan and Norman S. Andrews, contained in the paper attached to and made part of the bill of exceptions, marked "A B." This was objected to, but was admitted, and the defendants excepted. (Rec., p. 116.)

After the plaintiffs had closed their testimony-in-chief, the defendants severally, by their counsel, moved the court to rule out and exclude from the jury so much of the testimony, oral and documentary, as had been admitted against their said objections. The defendants severally made, in respect thereto, a separate and distinct motion as to each item and portion of the testimony so objected to. The court overruled the said motions, and permitted all said testimony to remain for the consideration of the jury; to each of which rulings, as made, the defendants severally excepted. (Rec., p. 116.)

Counsel for the Railway [Ohio] Company then moved the court to take the case from the jury so far as that company was concerned. The court overruled this motion, and the defendant excepted. (Rec., p. 116.)

Thereupon the defendants gave evidence to the jury to sustain their defence, and rested their case. The plaintiffs then gave certain evidence in rebuttal, certain portions of which were objected to. These objections were overruled and the testimony admitted, to which the defendants excepted. (Rec., p. 118.)

The questions arising as to the competency of the evidence objected to, will be discussed in their proper place.

After the testimony had closed, counsel for the defendants requested the court to give certain instructions to the jury. These are set out in the record, pages 118 to 124, inclusive.

All these requests, except in so far as they were embraced in the charge given, were refused; to which refusal the defendants, by their counsel, then and there severally excepted. (Rec., pp. 124, 135, and 137.)

In the fifty-second request the Railroad [consolidated] Company asked the court to direct the jury to return a verdict in its favor. In the fifty-third request a like instruction was prayed by the defendant Railway [Ohio] Company. (Rec., p. 123.)

It being impossible to show to this court what portions of the instructions prayed for were given and what portions refused, without setting out the charge in full, the entire charge is incorporated in the bill of exceptions. (Rec., pp. 125–137.)

The defendants not only excepted to the refusal of the court to charge as requested by them, but also generally to the charge as given, and specially to certain portions specifically set forth in the bill of exceptions. (Rec., pp. 137–139.)

This writ of error is prosecuted to reverse the judgment of the Circuit Court.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in overruling the objection of the Mansfield, Coldwater & Lake Michigan Railway Company to the introduction of any evidence as against said Company.

2. The Circuit Court erred in permitting the plaintiffs to introduce incompetent and irrelevant evidence to the jury against the objections of the defendants.

3. The Circuit Court erred in overruling the several motions of the respective defendants to rule out and exclude from the jury incompetent and irrelevant evidence given by the plaintiffs.

4. The Circuit Court erred in overruling the motion of The Mansfield, Coldwater & Lake Michigan Railway Company to take the case from the jury as to said last-named defendant.

5. The Circuit Court erred in refusing to instruct the jury as requested by the defendants.

6. The Circuit Court erred in the instructions given to the jury upon the trial of said cause.

7. The Circuit Court erred in overruling the motion of The Mansfield, Coldwater & Lake Michigan Railway Company for a new trial.

8. The Circuit Court erred in overruling the motion of The Mansfield, Coldwater & Lake Michigan Railway Company in arrest of judgment.

9. The Circuit Court erred in overruling the motion of The Mansfield, Coldwater & Lake Michigan Railroad Company for a new trial.

10. The Circuit Court erred in overruling the motion of The Mansfield, Coldwater & Lake Michigan Railroad Company in arrest of judgment.

ARGUMENT.

I.

A Preliminary Question.

The original construction contract upon which the action below was brought was entered into by Swan, Rose & Co. on the one part, and the Railway Company (Ohio corporation) on the other part, shortly before the completion of the proceedings for the consolidation of the Ohio Company with the Michigan Company, under the Statutes of Ohio and Michigan. The contract was made in contemplation of, and the work was done *after* the consolidation had been completed.

The plaintiffs, proceeding upon the assumption that as to them the existence of the Ohio corporation was continued under the Statutes of Ohio, notwithstanding the consolidation, brought their action against the *Railway*, or Ohio Company, and the *Railroad*, or consolidated Company, jointly, and demanded judgment against them both, not only for the amount alleged to be due under the original contract, but also for the amount claimed for extra work under an arrangement alleged to have been made with the consolidated Company while the work was progressing. The Circuit Court rendered judgment against the two corporations jointly for the amount found by the jury to have been earned under the original contract, and not paid for, and against the consolidated corporation separately for the additional amount found to be due for extra work procured to be done by that Company.

This course of procedure was founded upon Section 3384 of the Revised Statutes of Ohio, which embodies former legislation upon the same subject. It is there provided that—

> "All rights of creditors, and all liens upon the property of either of such Companies [entering into the consolidation] shall be preserved unimpaired, and the respective Companies *may be deemed to be in existence to preserve the same;* and all debts, liabilities and duties of either of said Companies shall thenceforth attach to the new Company, and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it."

Does this Statute continue the separate existence of the Ohio corporation, so as to enable creditors to proceed against it in the same manner as if no consolidation had taken place, or is the old Company "deemed to be in existence to preserve the" rights and liens of creditors merely? In other words, to prevent the utter annihilation of its indebtedness resulting at common law from the cessation of its corporate existence, leaving creditors to enforce against the new corporation and the property which passes to it under the consolidation proceedings, whatever rights they had against the old?

Blackstone, in his commentaries, says:

> "The debts of a corporation, either to or from it, are totally extinguished by its dissolution, so that the members thereof can not recover, or be charged with them, in their natural capacities; agreeable to that maxim of the civil law, '*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*'" 1 Com. *484.

In the case of *Shields* v. *The State*, 26 Ohio St. Rep. 86, the Supreme

Court of Ohio, discussing the effect of a consolidation of two or more railroad companies under the Statutes of Ohio, says: (pp. 91–2.)

"The consolidation took place in 1869, and was effected in all respects in pursuance of the Act of April 10, 1856 (4 Curwen, 2791; S. & C. 327); and the claim is that a consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of the companies so uniting, and the acceptance of a charter *de novo* from the State. If such be the law, it can not well be denied that the consolidated company, organized, as it was, after the taking effect of the present Constitution, is bound by and subject to all its provisions. Is such the legal effect of the consolidation? *Are the old companies dissolved and their charters extinguished, and is the consolidated company a new corporation, receiving all its rights and powers directly from the Legislature?* In the light of the decision by this Court in the case of *The State of Ohio* v. *Sherman et al.* (22 Ohio St. 411) we do not see how an affirmative answer to these questions can be avoided."

The judgment of the Supreme Court of Ohio in the foregoing case was approved by this Court. *Shields* v. *Ohio*, 95 U. S. (5 Otto), 319. In the course of the opinion, delivered by Mr. Justice Swayne, he said:

"The Legislature had provided for the consolidation. In each case before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. *All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should just surrender their vitality and submit to dissolution.* That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view." (Pages 322–3.)

Again:

"When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction." (Pages 323–4.)

From these views it would seem that when the consolidation is fully perfected in the manner provided by the Statute, the existence of the constituent companies is preserved merely for the purpose of preserving the rights and liens of creditors, but that these rights must be pursued against the new corporation. The Statute expressly provides, as already shown, that—

"All debts, liabilities and duties of either of said companies *shall thenceforth attach to the new company, and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it.*" 1 Rev. Statutes of Ohio, Sec. 3384.

Counsel for the defence, at the commencement of these proceedings insisted that the Railway [Ohio] Company was not to be regarded as in existence for the purpose of being sued; that no means were provided for serving process upon it; that judgment could not be rendered against it; and hence they declined to answer in behalf of that company. And in an amendment to the answer of the Railroad [consolidated] Company, they pleaded that the former company had become consolidated with, and merged into, the latter company, and had ceased to exist. (Rec., pp. 52–3.) But this claim was disregarded. A default was taken against the Railway Company; a jury empannelled to assess damages, and a verdict and judgment rendered against it for a large amount. (Rec., p. 52; side page 136; also p. 55.) It then became necessary to act; proceedings in error were prosecuted in the name of the Railway Company, and after the reversal of the judgment, an answer was also filed in the name of that company. But it is submitted that if the old company had in fact and in law, ceased to exist, ex-

cept for the sole purpose of keeping alive the rights of creditors as against the property which passed by operation of law to the new corporation, no rights have been lost by reason of an appearance in the name of the old company.

The court below having exercised jurisdiction, and rendered judgment against the Railway Company, the judgment is not to be regarded as a nullity, but is simply erroneous, and may be reversed, as in the case of a judgment rendered against a deceased person. See Freeman on Judgments, section 153. It is also "competent for a court of error to reverse a judgment void for want of jurisdiction in the court rendering the same, although the plaintiff in error may have voluntarily resorted to such last-mentioned court." *Evans* v. *Iles*, 7 Ohio St., 233, citing the judgment of this court in *Capron* v. *Van Noorden*, 2 Cranch, 126.

As there is a *joint* verdict and judgment against the Railway [Ohio] Company and the Railroad [consolidated] Company, if the verdict and judgment is erroneous as to either, the judgment must be reversed and the verdict set aside as to both. The judgment must "either be affirmed or reversed as an entirety." *Bery* v. *Railway Company*, 26 Ohio St., 673,676; *Blanchard* v. *Gregory*, 14 Ohio, 413: *Easton* v. *Calendar*, 11 Wend, 90; *Richards* v. *Walton*, 12 John, Rep. 434; Com. Dig. Title Pleader, 262. See, also, 1 Chitty on Pleadings, 16th Amer. edit. by Perkins, p. *426, and notes, (pp. 535–536, paging at foot.)

A joint liability for the debts or contract obligations of the old company seems to be a legal impossibility. In the very nature of things only one company can be liable. If the consolidation is perfected in all respects, then the new company becomes bound. If it is not so perfected, then the old, and not the new company, is liable.

I again respectfully call attention to the fact that the Railway [Ohio] Company objected to any evidence being received, as against it, on the ground that as to it, the original and amended petitions showed no cause of action. (Rec., p. 113.) Also that after the testimony for the plaintiffs had closed, the same company moved the court to take the case as to it from the jury. (Rec., p. 116.) Also that each of the two companies moved the court to instruct the jury to return a verdict in its favor. (Rec., p. 123, requests 52 and 53.). The motions in arrest of judgment presented the same objections. (Rec., pp. 111–112.) At every step in the case, therefore, the defendants were insisting that no liability was shown against them, either in the pleadings or in the testimony.

II.

Granting that the existence of the Ohio Company was continued for all purposes so far as its creditors are concerned, still, upon the petition as amended no case is made against it.

The petition alleges that the formal written contract for the construction of the road bed was entered into with the Ohio Company on the 10th of May, 1871. This was the day on which the stockholders of the Michigan Company approved the articles of consolidation, and the day on which the

stockholders of the consolidated company elected a board of directors. The petition also makes the following averment:

"Said contract (exhibit A) was made in anticipation of said consolidation by said two railway companies, which consolidation was effected before any work was actually done thereunder. And said Mansfield, Coldwater and Lake Michigan Railroad Company assumed said contract, and undertook to fulfill the same as undertaken on the part of said Mansfield, Coldwater and Lake Michigan Railway Company, and all transactions thereunder from said June 1st, 1871, were actually done and had with said railroad company." (Rec., p. 5).

The answer admits

"That said contract exhibit "A" was made in anticipation of the consolidation by said two railway corporations, and that all transactions thereunder were after said consolidation." (Rec., p. 44; side page 112.)

In the amendment to the petition, made after the trial in the Common Pleas and before the trial in the Circuit Court, the plaintiffs say:

"Under leave of the court for this purpose granted, at its June term, A. D. 1878, the plaintiffs file herein the following amendment to their original petition filed herein, and say the same should be read, and treated as inserted in said petition, at the end of the body of said petition, and immediately preceding the prayer thereof, which begins with the words "wherefore plaintiffs say there is justly due them," to-wit:

"That the work and labor done by plaintiffs and the materials by them furnished for and to the defendants, The Mansfield, Coldwater and Lake Michigan Railroad Company (consolidated) in the building of railroad for it, as herein set forth, and under the contract obligation set forth, and the special request and agreement, as to extra work set forth, were done and furnished by plaintiffs for, and to, the said defendant, railroad company (consolidated) at its request, and by and with its full knowledge, approbation, and consent, and for its benefit, which it duly had and received; and that said work and labor, and said materials, were of the value of the sum of nine hundred and twenty-eight thousand nine hundred and forty-seven dollars and twenty-six cents ($928,947.26), the which sum, the said defendant then justly owed therefore to plaintiffs, less only the sum of five hundred and thirteen thousand one hundred and eighty-seven dollars and ninety-seven cents, ($513,187.97), which said defendant had therefore paid to plaintiffs thereon, and the balance of which sum so reduced, being the sum of four hundred and fifteen thousand seven hundred and fifty-nine dollars and twenty-nine cents, ($415,759.29), ought to draw interest from June 1st, A. D. 1872, as the date when said balance of indebtedness fairly averaged to fall due and payable to plaintiffs, as from time to time they had completed large portions of their work.

"That plaintiffs on or about said October 23rd, 1872, demanded of said defendant payment of what it had so as aforesaid earned of said defendant, which the said defendant then refused and hitherto hath still refused." (Rec., p. 85.)

It is exceedingly questionable, even under the allegations of the original petition, whether any such contract is shown as creates a liability against the Ohio Company. It is true that the contract was signed by that company; but it was signed long after articles of consolidation had been executed by the directors, and after these articles had been approved by the stockholders of the Ohio Company, and upon the same day that they were approved by the stockholders of the Michigan Company. Both parties aver that the contract was executed in anticipation of the consolidation, and that all transactions thereunder were after the consolidation. The plaintiffs also aver that the consolidated company assumed the contract, and all obligations thereunder of the old company.

In the amendment to the petition the plaintiffs go still further, and allege in direct terms that all the work was done and all the materials were furnished, to the consolidated company, under the contract set forth and at the special request and agreement of that company as to extra work, and for its benefit. Taking all these allegations together it seems plain that no

case is made against the Ohio Company. The intention of both parties was to make a contract for the benefit of, and to be performed by the consolidated company; and it was regarded and treated from the date of the filing of the articles of consolidation as the contract of the new company.

III.

Granting that the existence of the Ohio Company was continued for all purposes as to its creditors, nevertheless the Court erred in refusing to charge the jury as requested by counsel for that Company, in respect to the effect upon its rights of the change made in the construction contract after the consolidation.

It is a fact, admitted in the pleadings and shown in the testimony, that while Swan, Rose & Co. were progressing with the work, and about June 10, 1872, they were released from the performance of what is known as the "Toledo work," embracing about seven linear miles, and extending from the tangent point of the curve of the Dayton & Michigan Railroad, on the east side of the Maumee River, to and across the river, through the City of Toledo to the State line of Michigan. This part of the work included the construction of a bridge across the Maumee, at Toledo, and involved a very large expenditure of money.

Some of the most important questions arising in the case grow out of this change in the contract; Swan, Rose & Co. insisting that by express agreement the amount to be relinquished from the contract price on account of the release of this work was definitely fixed and determined; and the railroad company claiming that the amount relinquished was the precise sum which would have been paid for the work had it been done under the contract. The difference between the parties in this particular amounts to between two and three hundred thousand dollars.

It is not proposed, however, to present or discuss these questions in this connection, but only to state so much of the facts bearing upon this part of the controversy as will enable us to present the point stated at the head of this division of our argument.

After the evidence had been given, and the arguments of counsel concluded, the Railway Company made the following request:

"The defendant, The Mansfield, Coldwater & Lake Michigan Railway Company (Ohio corporation), requests the Court to further instruct the jury, as follows:

"The rights and obligations of said Mansfield, Coldwater & Lake Michigan Railway Company (Ohio corporation) are in no manner affected by the contract or releases of June 10th, 1872, in relation to that part of the line of said road lying between the tangent point of the curve of the Dayton & Michigan Railroad and the State line of Ohio and Michigan. As to said last named defendant, its liabilities, if any, are fixed and measured by the original contract with the plaintiffs, and cannot be increased or added to by any of said transactions of June 10th, 1872. As to said defendant, the plaintiffs cannot be allowed any increased compensation for the work done by them, on account of the stipulations of said paper known as release 'E.'" (Rec., p. 124)

The Court responded to this request in the following terms:

"The defendants ask me to charge that this release executed by Willard S.

Hickox, as President of the consolidated company, is not a binding release upon the old corporation, the railway company. I direct you, gentlemen, if that release increases the obligation of the old corporation, that then it is not binding upon it; that is, the new organization could make no new liabilities that would be binding upon the old corporation. They are compelled to carry out the obligation and liabilities of the old corporation, as they assumed to do by the terms of their consolidation, but they are held or prevented from making any changes in such obligations or liabilities, so as to hold the old corporation liable for any increased liability.

"Now, you have heard the arguments on that point as to whether this release increased or diminished the obligations of the old corporation. Well, that depends generally whether, upon the terms of that release, Swan, Rose & Co. did not release as much as the liability of the old corporation would be increased by lessening the length of that road, and hold them to pay as much for the remainder of the line as for the whole, after allowing them the benefit of the amount of the stock and money released by that contract" (Rec., p. 135.)

To the refusal to instruct as requested (Rec., p. 137) and to the instruction given as above set forth, the defendant excepted. (Rec., p. 139.)

With all due deference to the learned Judge who presided at the trial of the case, it is respectfully submitted that the instruction given does not meet the point presented, nor make plain to the jury the real question involved.

By the terms of the original contract an agreed price was to be paid Swan, Rose & Co., for constructing the entire line of road, including the branches. Long after the consolidation, and while the work was progressing under the direction of the consolidated company, that company made an agreement with Swan, Rose & Co., by which a large and expensive proportion of the work was withdrawn from the contract. In the absence of an express stipulation to the contrary, the withdrawal by mutual consent, of a proportion of the work would release the company from liability for a corresponding proportion of the consideration to be paid for the entire work. That is, if by agreement, Swan, Rose & Co. were released from doing a certain part of the work, the railroad company was also released from paying a sum equal to that which they would have paid for the work released had it been done. On behalf of the Ohio Company it was insisted that the new company, in releasing a portion of the work, could not, by the contract of release, impose upon the former a liability to pay more for the remaining work than would have been required had no change been made. And that if, by abating from the original contract price a small proportion only of what would have been paid under the contract for the work released, the cost of the remaining work was proportionately increased, this increase should be borne by the consolidated company alone. The court was requested to instruct the jury in accordance with this view; but instead of complying with this request, gave an instruction which probably led the jury to understand, that if, by withdrawing from the contract the seven linear miles of work referred to the entire consideration to be paid for the remaining portion was reduced below, or did not exceed the sum to be paid for the entire work, the Ohio Company had no reason to complain. Upon this principle if nine-tenths of the work had been released without a relinquishment of any part of the consideration, the old company would still have been bound for the payment of the entire consideration agreed to be paid for the whole work. I may misapprehend the meaning of the court in the particular instruction here objected to. At all events the instruction requested was not given; and I claim that it was unobjectionable in every particular, and should have been given without qualification.

IV.

The Circuit Court erred in admitting irrelevant and incompetent evidence, and in afterwards refusing to rule from the jury the evidence so admitted.

This objection bears mainly upon the validity of the claim made by the plaintiffs against the Railroad [consolidated] Company for extra work. The petition asserts a claim against the two corporations jointly for work done under the original contract, and also a claim for extra work claimed to have been done at the special request of the consolidated company. The allegations of the petition in regard to this claim are as follows:

"That immediately upon the execution of said contract "A" plaintiffs entered upon the performance of their part thereof in good faith, and continued duly and diligently to perform, and did perform all the matters and things in said contract demanded of said plaintiffs to be done and performed up to and until September 7th, 1871, before which time it was discovered that various of the estimates of quantities of grading, cutting and filling and other work upon and accompanying the original plans, and profiles, which were basis for said contract as aforesaid had been, and were too small in amount to meet the requirements of the road as contemplated to be built in said contract, and as required by the chief engineer of the said railroad company under whose directions plaintiffs were obliged by said contract to do said work.

"The said increase of work required over said original estimates, required a large amount of extra, and increased work and materials from plaintiffs over and above the amount required by said contract as originally entered into. That thereupon, and about said September 7th, 1871, plaintiffs notified defendants of the said requests and requirements of defendant's chief engineer upon plaintiffs for said increased work, and of said under estimates on said original profiles and declined to perform said extra and increased work, without an agreement with defendant for pay therefor, and thereupon, and on said date, said railroad company defendant, approved said requests and requirements and agreed with plaintiffs that it would pay plaintiffs a fair and reasonable price for any and all extra and increased work they should do in building said railroad lines. That the plans, profiles, specifications and estimates for the various portions of the work of building the road and branch of defendants referred to in said contracts have always been, and now are in the possession and control of defendants, and are inaccessible to plaintiffs, and are very voluminous and it is impossible for plaintiffs to set them forth specifically.

"That upon, and after the said agreement by said defendant, plaintiffs continued duly and diligently to do and perform, and did perform all the matters and things in said contract "A" demanded of plaintiffs to be done and performed, and also in addition thereto plaintiffs did and performed, all the said extra and increased work requested by said engineer and by defendant agreed to be paid for at a fair and reasonable price as aforesaid." (Rec., pp. 5–6.)

These averments are susceptible of two constructions: one, that the estimates of quantities made by the engineers and written upon the profiles, were underestimates of the work actually required to be done by the profiles; the other that changes were made as the work progressed, requiring an additional amount of work to be done.

The original contract, with the specifications annexed, forms a part of the petition. (Rec., pp. 10–15.) Forming part of this contract are certain other contracts, copies of which are also made part of the petition. (Rec., pp. 16–22, Exhibits "B," "C," and "D.") All these papers were also made part of the evidence in the case.

By the terms of this contract the plaintiffs undertook to build the *entire line* of railway, together with the branch line, including excavations and embankments for road crossings, and ordinary sidings, with all necessary

bridges, culverts and masonry; they were to grub, clear, grade, bridge, and furnish the ties for the entire line; they were to build a bridge across the Maumee; they were to fence the branch line; the work was to be done under the supervision of the engineer, who was to give such instructions, not mentioned in the contract, as the circumstances attending the work might require; excavations for road crossings, and ordinary sidings, ditches and foundations were to be made when required by the engineer, the same as other excavations.

The terminal points of the lines of railway to be so constructed, are stated in the contract; the particular route of the branch line is also set forth. The following is the stipulation as to the main line:

"The entire line of railroad of the Mansfield, Coldwater & Lake Michigan Railway Company, from the point of intersection of said Mansfield, Coldwater & Lake Michigan Railway with the Pittsburgh, Fort Wayne & Chicago Railway, and about seven miles from the passenger depot of said last named company, in the City of Mansfield, Ohio, to the terminus thereof on the State line between Ohio and Michigan, and on the northern boundary line of Williams County, in the State of Ohio, so as to connect with the Ohio & Michigan Railroad at said State line, *as now or hereafter located by said Mansfield, Coldwater & Lake Michigan Railway Company.*" (Rec., p. 12; side page 34.)

By their contract, therefore, the plaintiffs bound themselves to construct the lines of railway therein provided for, according to its terms and the specifications annexed to and made part of it; and even if it were true that the officers of the company had, upon the profiles or otherwise, underestimated the quantities of work required by the contract, nevertheless the plaintiffs were bound to do the work as stipulated, and a subsequent promise to pay an additional sum, merely because there was an error in the computation of the quantities, would be without consideration. (*Nesbitt* v. *L., C. & C. R. R. Co.*, 2 Spears, 697; *Colcock* v. *L. R. R. Co.*, 1 Strobhart, 329; *Reynolds* v. *Nugent*, 25 Ind. 328; *Collins* v. *Godefroy*, 1 Barn. & Adol. 949; *Stilk* v. *Myrick*, 2 Camp. 317.) It is nowhere averred in the petition that fraud was committed by the officers of the company; that any wilful misrepresentation was made; that there was any bad faith, or any attempt to purposely mislead the plaintiffs; nor was any proof given tending to establish any unfair conduct on the part of the company.

By the provisions of the contract the plaintiffs undertook to make the *necessary* "excavations and embankments for road crossings and ordinary sidings, with all *necessary* bridges, culverts and masonry." They also undertook to cut side ditches, when directed, for drainage, and also to make "excavations and embankments for road crossings, and ordinary sidings, ditches and foundations," *when required by the engineer.* The stipulation is not that they shall make such road crossings, or such farm crossings, or such ditches as may happen to be marked upon the profiles; but it is to do *all* necessary work of that kind *when required by the engineer.*

The plaintiffs testified that before they made their bid for the work, certain profiles and maps were exhibited to them, and certain statements were made to them concerning the probable quantities of excavation and embankment which would be required in the work of construction; but there is no pretence that the engineers had then completed their work in the field, or that working profiles had been prepared. The testimony of Mr. Andrews, one of the principal witnesses for the plaintiffs, shows, not only that surveys were being made, and profiles constructed at the time referred to by the plaintiffs, but also that no final location had been made of a considerable portion of the line. It follows that such papers and profiles as were in-

spected by the plaintiffs were necessarily incomplete, and that this was well understood; also that any statements made were known to be mere opinions, based upon the incomplete data then at hand. Indeed, the testimony establishes this beyond all reasonable question.

Except in one or two isolated instances no proof was given showing that any actual change had been made in the line. There was no testimony showing that the contractors had been compelled to excavate below the grade line marked on the profiles; that the cuts were deeper or the embankments higher. Nothing of that kind. But it was claimed that inasmuch as the quantities estimated by the engineers as the work progressed exceeded the quantities noted on the profiles it followed that a change had been made in the work.

The profiles, it will be observed, are not made part of the contract by reference or otherwise. It seems clear, therefore, that they are not to be regarded as part of the contract. See *Cannon* v. *Wildman*, 28 Conn., 472; *Riley* v. *City of Brooklyn*, 46 New York, 444; *Nesbitt* v. *Louisville, Cincinnati & Charleston R. R. Co.*, 2 Spears, 697; *Sherman* v. *New York*, 1 Comstock, 316; *Devlin* v. *New York*, 4 Duer, 337; *Colcock* v. *Louisville R. R. Co.*, 1 Strobhart, 329; *Coker* v. *Young*, 2 Fost. and Fin. 98; *Thorn* v. *Mayor*, &c., L. R., 9 Exchequer, 163; S. C. in the Exchequer Chamber, L. R. Com. Law Series of 1875, part 6, p. 112; *Scrivener* v. *Pask*, L. R. 1 C. P. 715.

If the true grade line was indicated on the profiles, and there was no substantial departure from this in the prosecution of the work, but there was an underestimate of quantities, there could be no recovery for such underestimate. This would certainly be the case unless fraud had been practiced upon the plaintiffs in inducing them to enter into the contract. See *Selway* v. *Fogg*, 5 Meeson & W. 83; *Saratoga R. R. Co.* v. *Row*, 24 Wend. 74. Coming now more directly to the objection that incompetent testimony was permitted to go to the jury bearing upon this claim for extra compensation, I call attention to the statement in the bill of exceptions that portions of the testimony of witnesses were objected to by the defendants; that the objections were overruled, and exceptions taken; and that the portions so objected to are indicated by a line drawn around them. (Rec. 114.) The motion to rule out this testimony was also overruled. (Rec , p. 116.)

On pages 245 and 246, are noted objections to a portion of the testimony of the witness Howard, a sub-contractor, in which he undertakes to detail a conversation had with the Chief Engineer, Gleason, about June 1, 1871. The witness testifies in substance that General Gleason stated to him that the quantities marked on a profile in the possession of the witness were full. This statement made, not to the plaintiffs, but to a third person some time after the construction contract had been entered into, was clearly incompetent, and was calculated to mislead the jury. Indeed, under the issues, it would have been incompetent even if made to the plaintiffs.

On pages 248–9 the same witness testified, against the objections of the defendants, that the quantities of the work done upon his portion of the road exceeded the quantities marked upon the profile by which he was working. On page 251 he testified to the value of the alleged increased work. All this was irrelevant. The witness testified that he worked to the stakes set by the engineer; that the grade was not changed to his knowledge; and that he did not know whether he worked to the grade established by the profile or not. (Rec., p. 265.) Whether or not the quantities ascertained by the

estimates exceeded the quantities marked on the profile, was, therefore, entirely immaterial.

The witness Andrews, a civil engineer, (p. 278) testified to his estimate of the cost of completing the work according to the contract. This was objected to, for reasons stated in the record, but the testimony was admitted.

The witness Herrick, also a sub-contractor, produced a profile which had been furnished him by one of the engineers sometime in the month of July. This profile was given in evidence notwithstanding the objections of the defendants. (Rec., p, 290.) The witness also testified that certain quantities given him by the chief engineer in the latter part of May were substantially the same as those marked on the profile referred to. He also testified to a conversation had with the chief engineer as to the manner in which it was thought a portion of the work might be done; and to the fact that the work was done in a different manner, and at a greater expense. (Rec., pp. 291–2.) It was not claimed that the witness was required to do the work in a manner different from that provided in the contract. All these conversations with the sub-contractor were manifestly irrelevant and incompetent, and could only tend to confuse the minds of the jury.

Lester E. Rose, a witness for the plaintiff, testified to transactions occurring at the office of the company at Mansfield on the day before the formal contract was signed. He stated, in substance, that profiles and plans were exhibited to the plaintiffs; that quantities were marked upon the profiles; and that there was a general conversation upon the subject. The testimony as to these occurrences and conversations was objected to, but it was all admitted. (Rec., pp. 348–350.) I submit that, as the action was upon the contract, and there was no allegation of fraud or misrepresentation, the previous conversations of the parties, and transactions connected therewith, were irrelevant.

John Swan, one of the plaintiffs, testified to the occurrences and conversations at the office of the company before the final execution of the contract. He further testified that he based his bid upon the data furnished by the company at that time. This evidence was objected to, but was admitted. (Rec., pp. 398–9.) It was irrelevant, for the reason before given. The matter is gone into more in detail by the witness, on pages 400 to 402 inclusive.

Much of the testimony given by the plaintiff Hutchinson is subject to the same objection. (Rec., pp. 479, 482, 483.) The testimony of this witness objected to on pages 482 and 483, is peculiarly obnoxious to complaint. So also is that noted on pages 488–9.

I call attention also to that part of the testimony of Stephen C. Rose, one of the plaintiffs, noted on pages 506, 507, 508, 509, 517, which is subject to the same objection already made.

There is scattered throughout the record much other testimony of a similar character, but it is not necessary to weary the Court with a recapitulation of it. (See bill of exceptions, pp. 114–15, side pages 310–314.) The instances referred to are sufficient to enable the Court to pass upon the question presented as to its competency and relevancy.

2. The petition avers an express promise by the company to pay for what is alleged to be extra work. This claim is founded upon two letters, one written by Swan, Rose & Co. to the executive committee of the railroad company, and the reply thereto, written by Willard S. Hickox, the President of the company and one of the members of the executive committee. It

was also claimed on the trial that the act of Hickox in writing the letter referred to was ratified by Cook and Sturges, also members of the committee, and that the work was done with their knowledge, and without objection from them.

Upon this part of the case conflicting testimony was given on the trial.

The two letters referred to were admitted against the objections of the defendant (Rec., 114–115.) They are as follows: (Rec., 181–2.):

Exhibit "J."

"*Mansfield, Coldwater and Lake Michigan Railway Company.*

CONTRACTOR'S OFFICE, OHIO DIVISION,
MANSFIELD, O., Sept. 1, 1871.

SWAN, ROSE & CO.,
Contractors.

Messrs. Hickox, Sturges & Cook, Executive Committee Mansfield, Coldwater and Lake Michigan Railroad.

GENTS:—Since entering upon the work of constructing your road under our contract bearing date the 10th day of May, 1871, your chief engineer has made various changes in the grades and excavations and also in the character of the bridges and culverts, which changes involve a heavy expense and a great increase in the cost of constructing your road; as you know we based our bid for the work and entered into the contract to build your road upon the profiles exhibited to us, as well as upon the specifications and estimates made by your engineer, and also upon the stated terms of your proposed contract with the Pennsylvania Company, requiring you to build a road equal to the Grand Rapids and Indiana Railroad, between Sturges and Grand Rapids. The changes suggested by your engineer increasing the amount of earthwork, and the changes in the bridges and culverts if insisted upon will increase the expense of building your road to such an extent that we shall be utterly unable to construct the road for the price per mile fixed in our contract with your company, and unless some agreement can be made allowing us an increase of pay in proportion to the increase of work and materials, we shall be compelled to insist upon doing only so much work as was represented to us would be necessary to build the road, or we shall be obliged to abandon the work. We are willing to do all the work you require, if you will fix a satisfactory price for it, or agree that we shall be paid a reasonable price for such extra or increased work as we may do.

Respectfully yours,

SWAN, ROSE & CO.,

Per LESTER E. ROSE, *Secretary.*"

Exhibit "K."

OFFICE OF
"THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD,
MANSFIELD, O., Sept. 7th, 1871.

MESSRS. SWAN, ROSE & CO:

GENTS:—I am in receipt of your favor of September 1st inst., and in reply have to say that for any increase or extra work over and above the estimates and specifications of General Gleason, our engineer, and his assistants as shown to you and other bidders upon the occasion of your taking the contract to build The Mansfield, Coldwater and Lake Michigan Railroad in Ohio, we expect to pay you a reasonable compensation, and you may be assured that to the extent of the means of our company at the disposal of the Executive Committee in Ohio, you shall be paid a fair and reasonable price for any extra or increased work you may do in building our road.

Very truly yours, &c.,

WILLARD S. HICKOX, *President.*"

Neither the president of the company nor the executive committee had power to enter into a new contract.

Article nine of the articles of consolidation provided for the appointment in each State of an executive committee, to consist of nine stockholders, which should have the general control of all business pertaining to the interests of the road. (Rec., p. 682.) The by-laws embodied, in substance, the same provision. They also defined the powers of the president, and authorized him to enter into such contracts as should be ordered by the board, or as should be in accordance with the policy of the company, *but subject to the approval of the board.* (Rec., p. 681.)

The executive committee of nine was appointed May 10, 1871. (Rec., p. 118; side page 320.) Messrs. Hickox, Sturges and Cook had been appointed an executive committee by the Ohio corporation before the consolidation, and continued to act as a sort of sub-committee after the consolidation. (Rec., p. 345; side page 185.) But their transactions under their original appointment were to be subject to the approval of the board of directors. (Ibid.) The executive committee of nine, under the articles of consolidation, were to be controlled by the board of directors. (Rec., 144; Art. 9.)

With these limitations upon their authority, neither the executive committee nor the sub committee, nor the president, had power to enter into a new contract involving a large expenditure of money. See Angell and Ames on Corporations, 8th edit., secs. 298, 299, 301: *Stoystown &c. Company* v. *Craver*, 45 Penna St., Rep. 386; *Farmers' Bank* v. *McKee*, 2 Penna. St. 318; *Hodges* v. *Railroad Company*, 27 Verm., 220; *Mt. Sterling &c. Company* v. *Looney*, 1 Metc., Ky. Rep. 550; *Leggett* v. *Banking Co.*, Saxton's Ch. Rep. 542.

And persons dealing with an officer of a corporation are bound by the restrictions contained in the by-laws. *Dabney* v. *Stevens*, 2 Sweeney, Sup. Court N. Y., 415; and cases there cited *McCullough* v. *Moss*, 5 Denio. 567; *Ernest* v. *Nicholls*, 6 House of Lords, 419; *Smith* v. *Hull Glass Co.*, 11 Com. Bench, 897, 926–7. See, also, Story on Agency, pages 822–3, Sec. 69, 7th edition.

It nowhere appears in the record that the correspondence referred to, nor any of the alleged acts of the sub-committee in connection therewith, nor the fact that it was claimed by the plaintiffs that they were doing extra work, were brought to the knowledge of the board of directors. The claim for extra compensation, therefore, rests exclusively upon the correspondence above given, and the alleged acquiescence of the sub-committee.

I insist that the correspondence referred to was improperly admitted, and that the motion of the defendants to rule it from the jury should have been sustained. As the jury returned a verdict against the consolidated company for $116,468.32, upon the claim for extra work, the question made is invested with considerable importance.

One peculiar feature of the correspondence referred to should not be overlooked. The promise in the letter of Hickox is conditional. It is in this form: "You may be assured *that to the extent of the means of our company at the disposal of the Executive Committee in Ohio*, you shall be paid a fair and reasonable price for any extra or increased work you may do in building our road." This qualified promise was founded upon the following stipulation contained in article nine of the articles of consolidation:

"But it is hereby expressly understood and agreed by and between the said com-

panies parties hereto, that the directors of the said consolidated company shall, in constructing the road-bed of the Mansfield, Coldwater and Lake Michigan Railroad Company, divide the road into two divisions of which that portion thereof lying between the city of Mansfield and the State line between the States of Ohio and Michigan, shall constitute and be the first division; and that part thereof lying between the said State line and the village of Allegan aforesaid shall constitute and be the second division; and in the construction thereof, the means, money, and funds raised by the Mansfield, Coldwater and Lake Michigan Railway Company, shall be used upon the first division of said road; and the means, money and funds raised by the Ohio and Michigan Railway Company, shall be used upon the second division of said road, and to that end, the directors of the Mansfield, Coldwater and Lake Michigan Railroad Company shall appoint an Executive Committee in each State, consisting of nine stockholders of each of the companies, parties hereto, residing respectively in the States where they are to act." (Rec., p. 144.)

The promise made by Hickox did not bind, nor was it intended to bind, the consolidated company, except to the extent that the means in the hands of the Executive Committee derived from the Ohio Company, might enable payment to be made. It devolved upon the plaintiffs to show, not only that extra work was done, but that there were means at the disposal of the Ohio Executive Committee from which payment might be made. This they failed to do. Indeed, it appears that the work was stopped on account of the insolvency of the company, and its inability to make further payment.

3. It seems proper to state briefly in this connection the claim of the defendants as to the manner in which the discrepancy between the computations of quantities marked on the profiles and the estimates of quantities of work done, arose.

It is shown by the testimony that the quantities marked upon the profiles were actual *embankment* quantities. As the work progressed it was measured in *excavation*. The effect of this was to add ten per cent. to the quantities noted upon the profiles; and as the final estimates include ten per cent. more than is marked as the embankment quantities on the profiles, the supposed excess is largely accounted for. Contractors understand this in bidding for work of this character, and graduate their bids accordingly.

A portion of the supposed excess is also accounted for by the building of side tracks, road and farm crossings, ditches, etc., not shown on the profiles, and for which no quantities were calculated in advance of the work.

Upon this branch of the case we refer, without quoting, to the following testimony: Testimony of Chief Engineer Gleason, pages 541, 557, 558; also to the testimony of the plaintiff, John Swan, pages 450, 451, 469, 470, side pages 402, 403; also page 475, side page 411; also to exhibits 25 and 26, prepared by Engineer Gleason, showing the actual excess of quantities, pages 237–241. There is other testimony in the record relating to this matter, but it is not necessary to trouble the court with it.

4. Testimony was also given by the plaintiffs to show the value of the entire work done and materials furnished by them (Rec., pp. 140–141.) The defendants objected, but the testimony was admitted, and exception was taken. (Rec., p. 116.) The ground of the objection to this testimony was, that the suit was brought upon a special contract, and that evidence of a *quantum meruit* or *quantum valebat* was not admissible. I insist that the objection was well taken. Where there is an express contract none can be implied. *Creighton* v. *Toledo*, 18 Ohio St., 447; *Abbott* v. *Inskip*, 29 Ohio St., 59; 1 Story on Contracts, Sec. 18, and cases.

5. The objection taken to the introduction of exhibit "E" of the

petition (Rec., p. 115) will be discussed in connection with another branch of the case.

V.

The Circuit Court erred in refusing to instruct the jury as requested by defendants, and in the instructions given to the jury.

Under this head several important propositions may be discussed.

1. In respect to the claim for extra work above considered, the court was requested to instruct the jury as follows:

"33. Before you allow the plaintiffs pay for any extra work, you must find that work over and above the specifications and requirements of the contract reasonably construed, was actually done. Before you can find that any work was done above the profile quantities, which the plaintiffs claim were shown to them, and which they say formed the basis of their bid, you must find that the profiles then existed with the quantities marked upon them.

"34. John Swan testifies that profiles of the entire line were not there when the bid was made, and not enough to form a correct estimate of them. That, from the profiles exhibited to him, he could not determine the number of yards in the line; but that, if he obtained quantities, it was not from profiles, but from statements made by third parties. If this be a correct version of the manner of obtaining quantities of work to be done, and the bid was made and accepted on such a basis, and the contract afterwards written out, the claim that extra work, or that work not embraced in the terms of the contract, was done, cannot be sustained.

"35. You will disregard and throw aside as no part of the contract sued on, all statements or representations made by General Gleason, or any other officer of the company as to the quantities and amount of work there was on the line.

"36. Unless the quantities appear upon profiles then made, then existing, and then exhibited to or seen by the plaintiffs when they made their bid for the work, and were relied upon by them as correct, and formed the basis of their bid, you will not consider the question of quantities as entering into the contract at all. In such case the written contract will embrace all the work to be done, whether it turns out to be more or less.

"37. The letter of Willard S. Hickox of September 7th, 1871, imposed no obligations upon the defendants.

"40. The election of Willard S. Hickox as president of the company, in January, 1873, was not a ratification of either release 'E,' or of the promise to pay for extra work.

"41. The defendants had a right to make reasonable and necessary changes in the work, as the necessity and propriety of so doing arose, while doing the work, and this the parties to the contract must be held to have contemplated when they made it. These changes, if made merely to construct and perfect such a line as was contemplated by the contract, although they increased the quantity of work to be done somewhat, cannot be called extra work, but must be considered as included in it.

"42. A promise by Hickox, or the Executive Committee to pay extra for work included in the contract of the plaintiffs is without consideration and void.

"43. A promise will not be implied to pay extra for work included in the contract made by plaintiffs.

"44. The mere fact that work was done upon the road by the plaintiffs above the profile quantities would not entitle them to pay for it. The stockholders would have a right to presume it was done under the contract.

"48. If the plaintiffs claim that the stockholders ratified the alleged promise to pay for extra work, it lies upon them to show it by evidence. You cannot presume

it was ratified, but it is incumbent on the plaintiffs to show by proper testimony that this was actually done, ratification being a fact, and not a favor. It lies upon the plaintiffs to show that they knew of this promise to pay extra for it, before, or while she extra work was being done, before you can find they ratified it; ascertaining it after the filing of the petition in the United States Court at Cleveland would not be aufficient.

"51. The company cannot be held liable on an implied promise to pay for extra work unless they knew, or had reason to know work was being done by the contractors over and above the requirements of their contract, and they kept silence about it when it was their duty to speak and repudiate all intention of paying for it if done, but the company cannot be charged with the consequences of this silence until it appear by the proofs it knew, or had reason to know work was being done above the requirements of the contract; knowledge or notice of this fact by officers interested with the plaintiffs in the contract cannot be called the knowledge of the company." (Rec., pp. 122–3.)

The following was the only response made to these requests:

"The plaintiffs seek to recover quite a large sum of money for extra work they allege they performed in the construction of this line of railroad. If they did extra work, and that work was not required by the contract, but was accepted and used by the defendant company, whether there was any express contract on that subject or not, the plaintiffs would be entitled to recover for such extra work. But you are first to determine whether there was any extra work performed; and in order to determine that you will look at the profiles of the line of the road, and if you find from such inspection that in any instance the plaintiffs, in compliance with the request of the engineer, were compelled to do work over and above that required by the contract, such as in raising or lowering the grade, that you will consider as extra work. For the defendants had no right to change the grade once established, after the plaintiffs had begun to build in accordance with it. But this rule applies only to material changes in the grade, and not to small changes; they would be considered as covered by the general contract; but there should be no substantial changes made, and if there were, and these plaintiffs worked under the changed grade, and the defendants accepted such work, that would constitute a claim for extra work. The same rule would apply as to culverts and bridges; if there were plans and specifications for bridges, those plans and specifications were made a part of the contract, and these plaintiffs were required to make them by the plans and specifications; but if these plans and specifications were changed, so as to require materially more work and material on the part of these plaintiffs, then you will consider that as extra work; the plaintiffs are entitled to recover compensation for it.

"It is alleged on the part of the plaintiffs that they are not entitled to recover under an implied promise to pay, but that there was an express promise from Mr. Hickox, as president of the road, that the defendant corporation would pay the plaintiffs a reasonable price for their extra work: I direct you, gentlemen, that Mr. Hickox, as mere president of that corporation, and as a member of the executive board, had no authority to make such an express contract, but that that contract, like any other, may be afterwards ratified, and if so ratified by the board of directors, it amounts to the same as if he had had authority." (Rec., p. 133.)

The defendants excepted to the refusal to charge as requested, and also to so much of the above charge as reads as follows:

"'But you are first to determine whether there was any extra work performed; and in order to determine that you will look at the profiles of the line of the road, and if you find from such inspection that in any instance the plaintiffs, in compliance with the request of the engineer, were compelled to do work over and above that required by the contract; such as in raising or lowering the grade, that you will consider extra work. For the defendants had no right to change the grade once established after the plaintiffs had begun to build in accordance with it. But this rule applies only to material changes in the grade, and not to small changes; they would be considered as covered by the general contract; but there should be no substantial changes made, and if there were, and these plaintiffs worked under the changed grade, and the defendants accepted such work, that would constitute a claim for extra work."

Also to so much thereof as reads as follows:

"The same rule would apply as to the culverts and bridges: If there were plans

and specifications for bridges, those plans and specifications were made a part of the contract, and these plaintiffs were required to make them by the plans and specifications; but if these plans and specifications were changed so as to require materially more work and material on the part of these plaintiffs, then you will consider that as extra work, and that the plaintiffs are entitled to recover compensation for it." (Rec., pp. 138–9.)

The court also gave the following instruction, which was excepted to in like manner:

"You are to look into these profiles for the purpose of ascertaining where the grade line was established, and where and how, by the contract between the parties, the plaintiffs agreed to construct the road." (Rec., p. 132, side page 361; also top page 138, side page 380.)

It is respectfully submitted that the foregoing requests were all proper, and should have been given, and that they are not covered by the charge as given. Several of the requests were not alluded to, either directly or indirectly. It is erroneously assumed, also, in the charge as given that the grade line marked on the profiles, most of which were made after the contract was executed, fixed and determined the line upon and in reference to which the road was to be constructed under the contract. The jury were explicitly told that the defendants had no right to make any substantial changes in the grade after the plaintiffs had once begun to build in accordance with it; and that if any substantial changes were made, "and these plaintiffs worked under the changed grade, and the defendants accepted such work, that would constitute a claim for extra work." That is to say: If the engineer had, in the first instance, after the contract was executed, fixed the grade upon the identical line to which the road was constructed, there would have been no legal claim for extra work; but if, after the work commenced, they changed the grade so as to establish the line at the same place, a valid claim for extra work would arise. In this connection, I ask special attention to the provisions of the contract and specifications (Rec., pp. 10–15), and particularly to the stipulation (p. 11) which declares that "The engineer will have constant supervision of the work, and give such instructions, plans and specifications, not herein mentioned, *as the circumstances attending the work may determine.*"

I again remind the court that most of the profiles, and especially the working profiles, were prepared *after* the contract had been concluded, and I insist that it was entirely competent for the engineer to make such changes as the work progressed as its exigencies might require; and that no liability for extra work was thereby created, unless, indeed, some unfairness was practiced, or the change compelled the plaintiffs to lose some work they had already done, or subjected them to some expense they would not have incurred had the line finally adopted been settled upon in the first instance. Compensation to the extent of such loss might have been entirely proper; but none such was claimed. Nor was it claimed that any changes were wantonly or unnecessarily made. The broad proposition was laid down by the court that a change in the grade line, made after the work commenced, entitled the plaintiffs to claim additional compensation for all the additional work required by the change; and this whether the profiles were constructed before or after the contract was entered into.

2. The next proposition to which I desire to call attention relates to a transaction of great importance, and involves the validity of the claim of the plaintiffs to the extent of a quarter of a million of dollars or more.

On the evening of May 8, 1871, the plaintiffs, F. M. Hutchinson and

John Swan, at Mansfield, Ohio, submitted to the board of directors of the railway company the following proposition in writing:

"*Defendants' Exhibit No.* 15.

MANSFIELD, OHIO, May 8th, 1871.

"*To the President and Directors Mansfield, Coldwater and Lake Michigan Railway Company:*

GENTLEMEN:—We, the undersigned, do hereby agree and propose to grade, bridge and furnish ties, and all work appertaining thereto, to place the road-bed in good order for the superstructure, on the line of the Mansfield, Coldwater and Lake Michigan Railway Company, extending from Mansfield (or Junction) to Coldwater, and from Tiffin to Toledo, in all (including fencing between the two last named points) about one hundred and seventy miles in length, per mile as follows: Four thousand two hundred and fifty dollars ($4,250) in cash, and two thousand dollars (2,000) in stock, or six thousand two hundred and fifty dollars, as above enumerated. Work to be done under and subject to the approval of the chief engineer of the company.

Respectfully yours,

F. M. HUTCHINSON,

JOHN SWAN.

"Alleghany City, Pa.

"We accept the conditions of contract between the Pennsylvania Company and your company, and Baltimore and Ohio and Toledo and Woodville and Trustees of the City of Toledo, on this proposal.

F. M. HUTCHINSON,

JOHN SWAN."

(Rec., p. 188.)

The execution, delivery and acceptance of this bid, are proved by the testimony of H. H. Sturges (Rec., p. 755), H. C. Hedges (Rec., pp. 691–2), J. H. Cook (Rec., p. 722), and the plaintiff, John Swan. (Rec., 433, side page 338; but particularly top pages 464–5.)

Messrs. Hedges, Cook and Sturges testify that at a meeting of the directors at Coldwater, Michigan, May 9th or 10th, 1871, Mr. Hickox reported to the board that the contractors claimed that they had made some error in their computations, and insisted upon an addition of $250 per mile to the contract price; and that after some discussion this demand was acceded to. (Rec., pp. 692–3; 724; 756.) The plaintiffs, in their testimony, deny that they made any such requirement. (Testimony of John Swan, Rec., p. 434; testimony of Hutchinson, Rec., p. 498.)

When the formal contract was prepared and executed, the cash part of the consideration was stated at $4,500 per mile, instead of $4,250 per mile, as named in the original proposition above set forth, which had been accepted by the company; *and simultaneously with the execution of the contract there was executed by Swan, Rose & Co., and delivered to Mr. Hickox, an assignment of the additional $250 per mile of the cash part of the consideration so carried into the contract.*

The answer makes the following charges in respect to this transaction:

"IV. For fourth division, and further answer to the petition of plaintiffs, and without waving any of the objections or benefit of any of the matters set forth in the first and second divisions of this answer, but still insisting upon the same, this

defendant says that prior to and at the time of the execution of the contract in the petition mentioned and marked 'A,' Willard S. Hickox was duly elected president of said Mansfield, Coldwater and Lake Michigan Railway Company mentioned in the petition, and had entered upon the duties of his said trust, and so continued until after the abandonment by plaintiffs of all work under said contract. That on the 7th day of May, 1871, or thereabouts, said John Swan and F. M. Hutchinson, of the plaintiffs herein, proposed to the defendants to do all the work, and furnish all the materials, mentioned in said contract 'A,' at the agreed price and compensation to be paid by defendants of ($4,250) forty-two hundred and fifty dollars per mile in cash, and ($2,000) two thousand dollars per mile in the stock of said railway company at the par face thereof, which proposition said railway company then accepted, but before the signing of said contract 'A,' and while said Willard S. Hickox was holding said position of trust toward said railway company and this defendant, said Willard S. Hickox fraudulently and corruptly conspired and colluded with said John Swan, F. M. Hutchinson and with said S. C. Rose, for the purpose of cheating and defrauding this defendant, and for the fraudulent purpose of adding to said contract price of said work and materials an amount over and above a fair compensation therefor, which should belong to said Willard S. Hickox; said Willard S. Hickox then acting as the principal agent of defendant for the letting of said contract, fraudulently procured said additional sum, to-wit: Two hundred and fifty dollars per mile to be inserted in said written contract 'A,' and procured the signing of the same by defendant with the agreement between said Hickox and said Swan, Rose & Co., that said additional sum should belong to said Willard S. Hickox as part of the profits of said contract.

"That as a part of said transaction, and at the same time in pursuance of said corrupt and fraudulent agreement and conspiracy, said Swan, Rose & Co., plaintiffs, did assign and transfer all their right to, and interest in said two hundred and fifty dollars per mile, to said Willard S. Hickox, which agreement and fraudulent collusion and interest of the said Hickox in said contract was wholly unknown to defendant until after plaintiffs abandoned said work. (Rec., pp. 44–5.)

To this the plaintiffs replied:

"As to the fourth division of said separate answer plaintiffs deny that on the 7th day of May, 1871, or thereabouts, or at any other time said John Swan and F. M. Hutchinson proposed to defendants, or either of them, to do the work and furnish the materials mentioned in said contract 'A' at the price and compensation of $4,250 per mile in cash and $2,000 per mile in the stock of said company at the par face thereof, and they deny that said railway company or said railroad company or any one in the behalf of either, then, or ever accepted any such proposition from plaintiffs, or either of them. They also deny that before the signing of said contract 'A' or any other time said Willard S. Hickox fraudulently and corruptly or otherwise conspired or colluded with plaintiffs, or either of them, or in any manner wrongfully or otherwise agreed with plaintiffs or either of them to increase the price and compensation to be paid plaintiffs in cash from $4,250 per mile, to $4,500 per mile, and said increase to be inserted in said written contract 'A' with the intent or purpose that said increase should belong to Willard S. Hickox or with any other intent or purpose. But plaintiffs aver the facts in this behalf to be that they proposed to said railway company to do the work and furnish the materials mentioned in said contract 'A' at and for the price per mile of $4,500 in cash and $2,000 in stock of said company at the par value thereof which said proposition said railway company accepted, and thereupon the said railway company and said Swan, Rose & Co., executed the said contract 'A' as in the petition alleged, and upon the execution of said contract the said Willard S. Hickox on behalf of the Board of Directors of said railway company and in the presence of several members of said board applied to plaintiffs for their consent and agreement to take and receive under said contract the sum of $4,250 per mile cash in lieu of $4,500 per mile cash for said work as in said contract stipulated; alleging to plaintiffs as a reason for such application that said Board of Directors had no other way of providing for reimbursing themselves for the expenses already then by them personally incurred, and thereafter necessary and proposed by them to be incurred in the prosecution by them of the enterprise of building said road, and thereupon said plaintiffs acceded to said application of said Board of Directors through said Hickox, and said other members of the board, and agreed to receive said sum of $4,250 per mile in cash instead and in lieu of said $4,500 per mile cash for such work and materials as stated and stipulated both in said proposi-

tion of plaintiffs said acceptance thereof by said railway company and in said written and executed contract 'A.'

"Plaintiffs acceded and consented to said application of said board through said Hickox and said other members of said board, and executed a paper to that effect with great reluctance, and were only induced to do so because they believed the facts to be as represented to them by said Hickox and said other members of said board in reference to the heavy expenses that said board had been at personally, and were thereafter to be at promoting and forwarding the enterprise of building said road, and because they then also believed that they could still make a profit on the execution of said contract at said reduced compensation; and still more because they believed that unless they consented to said reduction, the prosecution of said enterprise would be crippled by the unwillingness of said board to prosecute said enterprise with energy and efficiency at their further continued personal liability and expense.

"Plaintiffs deny that in pursuance of any fraudulent conspiracy as charged in said answer, or otherwise they, or either of them, as a part of said transaction at the time of the execution of said contract, or at any other time ever assigned or transferred to said Willard S. Hickox individually, or to any other person or persons individually other than as herein above stated by such consent to said application said $250 per mile cash rebated from said proposition acceptance and contract price, or ever transferred or assigned, other than as herein above stated any other sum whatever, or any interest in any sum or right whatever.

"They deny all, and every fraudulent agreement, collusion or conspiracy in fact, or in intent between them, any or either of them, and said Hickox in relation to said $250 rebated, and in relation to any and every other sum, matter and thing with a view to defraud said railway company or otherwise.

"They deny that said price proposed by them and fixed in said contract 'A' for said work and materials was excessive, or over and above a fair compensation for said work and materials in any sum whatever, and they deny that any part thereof was ever inserted in said contract in any fraud, or with any fraudulent intent, or that said contract was signed or procured to be signed in any fraud or concealment whatever.

"They deny that any part of said price, or said agreed rebate was ever to plaintiffs knowledge or the knowledge of either of them, to go to said Hickox individually, or for his separate benefit, or in any sense to belong to him, other than as herein afore set forth." (Rec., pp. 58–9.)

In July, 1873, the plaintiffs commenced an action upon the same contract and claim involved in this proceeding, in the Circuit Court of the United States for the Northern District of Ohio. In their petition, which is set out in the record, p. 147, they claimed and asked judgment for the full $4,500 per mile provided in the contract. (Rec., pp. 147–151.)

On the trial of the present case, L. A. Russell, Esq., one of the attorneys for the plaintiffs in the above case, was sworn as a witness. The following is part of his testimony:

Q. "I will ask you under whose advice it was in that suit a claim was set up for $4,500 a mile in cash?

A. "The plaintiffs' attorneys; they concluded that the $250 release might properly be set up by way of defense, and appear in that way better than to be pleaded by the plaintiffs. It being considered, on our part, in giving that advice that the $250 release might, in all probability as we judged, be a matter that the railroad authorities would prefer not to set up in defense, and face their stockholders after having set it up; and we thought perhaps they would not set it up.

RE-DIRECT EXAMINATION.

Q. "Then your idea was, if I understand you that perhaps the directors, rather than face their stockholders on that subject, would let you have your $4,500?

A. "That was our idea. We thought perhaps they would be ashamed to set it up.

Q. "Why did you suppose they might be ashamed to set it up?

A. "We regarded it then, as we do now, as a very dirty piece of business on the part of the directors.

Q. "What was it that made you think it was a dirty piece of business?

A. "Our client's statement of facts. That the directors were willing to pay out of the funds of the company on the contract, apparently $4,500; when all they did pay was $4,250, thereby deceiving the stockholders as to the application of their funds." (Rec., pp. 811-12.).

The above mentioned suit was afterwards dismissed.

For the facts connected with the execution of the contract and the assignment by Swan, Rose & Co. of the $250 per mile referred to, the court may consult the testimony of H. C. Hedges, pp. 691-5; the testimony of J. H. Cook, pp. 724-5; also pp. 736-7; the testimony of H. H. Sturges, p. 757; that part of the cross-examination of the plaintiff, John Swan, commencing on page 437; and that part of the cross-examination of the plaintiff Hutchinson commencing on page 492. The $250 per mile so added amounted in the aggregate to between $40,000 and $50,000.

The plaintiffs, for the purpose of showing that their original bid had been to do the work for $4,500 per mile cash and $2,000 per mile stock, gave in evidence so much of the *records* of the company as contained the report of the directors of the Ohio Company to the directors of the Michigan Company, made May 10, 1871. (Rec., p. 243, side pages 3 and 4.) In answer to this, the defendants gave in evidence the *original report* so made, in connection with the testimony of witnesses, showing that it had been altered as to the amount of the bid, after it had been submitted to the Michigan Company. (Rec., pp. 241-243; testimony of F. V. Smith, 660; testimony of H. C. Lewis, pp. 665-6; testimony of Joseph Fisk, pp. 678-9.)

H. H. Sturges, the treasurer, and General Gleason, the Chief Engineer of the company, both testify that they interposed and prevented the payment to the plaintiffs of any part of the additional sum so surreptitiously carried into the contract. (Rec., pp. 763-4; side pages 916-17; also pp. 564-5; side paging 578.)

Another significant fact to be noticed in this connection is, that shortly after the contract was executed one Robert McMann was made an equal partner in the firm of Swan, Rose & Co. McMann was a son-in-law of Hickox, and cashier in the bank of which Hickox was president. He contributed no capital, gave no assistance in any form in the prosecution of the work. He was a young man of but little business experience. All the circumstances attending his connection with the firm tend very strongly to show that he represented Hickox, and that the latter was the real partner. (See the testimony of the plaintiff, Swan, pp. 440, 441 and 467, side page 397; testimony of Hutchinson, p. 491; and especially that part of the cross-examination of the plaintiff Rose, contained in the record pages 523 to 526 inclusive, also the testimony of McLane, page 815.)

It was while the contract relations of the various parties were in this condition that the arrangement was made whereby the seven linear miles of the proposed road, known as the "Toledo work" were withdrawn from the construction contract. And out of this change has grown the most important part of the present controversy. The defendants claim that by the

terms of the contract of release, they were relieved from the payment of a proportionate part of the consideration money, and that this would have amounted to between two and three hundred thousand dollars. The plaintiffs claim that the defendants were relieved from the payment of a fixed sum only agreed upon by the parties, as shown in the alleged contract known as exhibit "E." The amount relinquished by this paper falls largely below what it would have cost to do the work under the original contract. This paper "E" was procured by Swan and Hutchinson from Hickox under circumstances that will be mentioned hereafter. It is claimed by the defendants that the transaction between Hickox and Swan and Hutchinson was fraudulent as to them: that Hickox had no power as president, or as a member of the Executive Committee, to make the alleged contract upon which the plaintiffs rely: that he was also incapacitated from acting in the matter by reason of his interest in the original contract under the $250 per mile assignment made to him; that the existence of the alleged contract "E" was kept concealed from the other members of the Executive Committee, and from the board of directors, and was never ratified by the board.

It was also claimed by the defendants that Mr. Hickox was disqualified from acting in the matter in question, by reason of the liabilities and responsibilities incurred by him under the contract entered into by him known as Exhibit "D" of the petition. (Rec., p. 21–2.)

The contract by which the seven miles of road in question were withdrawn from the construction contract of the plaintiffs, was executed at Pittsburgh, June 10, 1872. The principal parties to it were The Pennsylvania Company, The Toledo, Tiffin and Eastern Railroad Company, and the Mansfield, Coldwater and Lake Michigan Railroad Company. (Rec., p. 48–51.) At the time of the execution of this contract there was endorsed upon it the following consent and release by Swan, Rose & Co.:

"The firm of Swan, Rose & Co., acting by John Swan as a member thereof, duly authorized to sign this paper, hereby signify their approval of and assent to the contract annexed between the Toledo, Tiffin and Eastern Railroad Company and the Mansfield, Coldwater and Lake Michigan Railroad Company, joint parties of the first part, and the Pennsylvania Company, party of the second part, dated June 10th, 1872, and hereby release all claims for work done, or to be done, or for contracts between them and the first parties, or either of them, under which they, the undersigned, were to have constructed said road from Dayton and Michigan tangent, at or near Toledo, to and through said City, and beyond the same to the State line of Ohio and Michigan.

"The signing of this paper is not to interfere with or affect the contract heretofore entered into by and between the said Swan, Rose & Co. and the Mansfield, Coldwater and Lake Michigan Railroad Company, any further than it is applicable to that portion of said road above described, leading from the Dayton and Michigan tangent at or near Toledo, to and through said City, and beyond the same to the State line of Ohio and Michigan, and said contract is to remain in as full force and virtue in all other respects as though this paper had never been signed.

SWAN, ROSE & CO.

Witness present: FRANK SEMPLE."
June 10th, 1872. (Rec., p. 51.)

So far there is no question or controversy. (See bill of exceptions, p. 117, side page 318.)

The contract above referred to, with the foregoing release of Swan, Rose & Co., are known in the pleadings and testimony as release "O."

On the evening of the same day that the above contracts were executed the paper known as Exhibit "E" of the petition was signed by Hickox in

the name of the railroad company. This paper is set out in full on pages 22, 23 of the record. The consideration of the release is stated in this paper as follows:

"In consideration of which said release by said Mansfield, Coldwater and Lake Michigan Railroad Company, the said Swan, Rose & Co. do hereby agree to forego all benefit and advantages that might have accrued to them under the contract of the tenth day of May, A. D. 1871, for the building of that portion of the said company's road from the tangent point of the curve of the Dayton and Michigan Railroad, and from thence in, into and beyond the City of Toledo, Ohio, to the State line of Ohio and Michigan, and the said Swan, Rose & Co., as a further consideration, agree to surrender their right to have issued to them seventy-four thousand dollars of the stock of the Toledo, Tiffin and Eastern Railroad Company, which they are entitled to receive from said company by reason of the work already done in the construction of their road up to the tangent point of the curve aforesaid. And they also release their right to have paid to them forty thousand dollars in cash, and fourteen thousand dollars of the stock aforesaid, which they would have been entitled to receive if they had built the road from the tangent point of the curve aforesaid, into the City of Toledo and to the State line of Ohio and Michigan, which said stock and money would amount in the aggregate to the sum of one hundred and twenty-seven thousand dollars, or thereabouts."

It appears from the testimony of Mr. Hedges, the secretary of the company, that while at Pittsburgh, on the 10th of June, 1872, he prepared a contract to be executed by Swan, Rose & Co., which provided for the release by them, in consideration of the release of the Toledo work, of the sum of $258,000 of the cash price of the original contract; that this paper was submitted to Mr. Sturges and Mr. Hickox, and was twice read to the board of directors of the Pennsylvania company; that he and Mr. Sturges left for home on the same day, but Mr. Hickox remained to procure the signatures of Swan, Rose & Co to the paper so prepared by him; that Mr. Hickox, upon his return, reported to the witness that Swan, Rose & Co. had executed the paper substantially as he (witness) had prepared it; that this information was communicated to the sub-committee; that he made every effort in his power to get possession of the paper, but was unable to do so; and that he did not see it until it was laid before the board by Hickox in December, 1872, or January, 1873; that he had searched carefully in the safe for it, and it was not there. (Rec., pp. 696–702.)

The testimony of H. H. Sturges is to the same effect. (Rec., pp. 764–768; also, pp. 778–784.)

Mr. Hickox had absconded, and his testimony could not be procured, even if it had been thought desirable to obtain it. (Testimony of Hedges, p. 694, side page 802.)

The testimony of Swan and Hutchinson shows that in the evening of the day on which Hedges, Sturges and Hickox were at Pittsburgh, and after Hedges and Sturges had left, they induced Hickox to go with them to the office of their attorneys, and that the paper "E" was then and there prepared by the attorneys and signed by Hickox. (Rec., pp. 416, 417; 430, 431; 485, 486, 499, 500.)

Hickox, Hedges and Sturges, it will be observed, were the only members of the executive committee of nine who were at Pittsburgh. The testimony is conflicting as to whether or not Sturges and Cook had knowledge of the paper "E." They both testify that they had no knowledge of its contents or nature until it was produced by Hickox before the board, after the plaintiffs had quit work. The plaintiffs, and Lester E. Rose, their secretary, testify that Sturges and Cook had knowledge. Many of the directors were put upon the stand, and they uniformly testified that they were entirely

ignorant of the execution or existence of such a paper, and that Hickox had no authority to execute it. (Testimony of F. V. Smith, Rec., pp. 660, 662 and 678; of Henry C. Lewis, pp. 666–667; of Joseph Fisk, pp. 679–680; of A. L. Grimes, p. 792; of Barnabus Burns, pp. 794–95.)

The bill of exceptions contains the following: (Rec., p. 117.)

"Defendants, to further maintain the issue on their part, gave in evidence * * * so much of the official record of the proceedings of the board of directors of the Mansfield, Coldwater and Lake Michigan *Railway* Company as is copied and set out in said paper book marked exhibit 'A A' at page 999. This is the side paging; the matter referred to will be found on top page 813 of the present record. It is as follows:

"Defendants' Counsel offered in evidence, from page 83 of the records of the Mansfield, Coldwater & Lake Michigan Railroad Company, under date of May 10, 1871, as follows: 'This day the Board of Directors met. All present, and President Hickox in the chair. The secretary presented a formal contract for the letting of contract to Swan, Rose & Co., and the same was read as follows: (It is admitted the contract which follows is truly copied in exhibit A of the petition.)

"Also the words at the end of the contract as contained in the record.

"On motion of Mr. J. H. Cook, said contract was approved, and the President was authorized to execute the same, for, and on behalf of the company; the secretary to attest the same, all of which was done accordingly."

The object of this testimony was to show that the original construction contract was duly presented to the board by Hickox, for its approval.

The bill of exceptions also shows the following. (Rec., pp. 116–7.):

"The defendants also gave in evidence so much of the official record of the proceedings of the board of directors of the Mansfield, Coldwater and Lake Michigan *Railroad* Company as is copied and set out in said paper book marked exhibit 'A A' at pages 780–81."

The proceedings here referred to will be found on pages 681–2, of the present record. We call special attention to the following:

"Mansfield, Ohio, October 5th, 1872. This day the board met upon call of the President; all members present except Messrs. Lewis, Parkhurst, Skinner, Collier, Youngs and Grimes.

"Among these proceedings is the following: 'The president presented for approval of the board a contract which the Executive Committee of the Ohio Division had authorized him to enter into, and known as the agreement between the Toledo, Tiffin and Eastern Railroad Company and the Mansfield, Coldwater and Lake Michigan Railroad Company and the Pennsylvania Company, dated June 10th, 1872, by which, among other things, the Pennsylvania Company agree to build the railroad of the Toledo, Tiffin and Eastern railroad, from the tangent point of the curve of the Dayton and Michigan Railroad through and within the city of Toledo, and the action of the president in executing the same was approved.'" (Rec., p. 682.)

Observe: The paper here presented by Hickox, and approved by the board, was the contract executed at Pittsburgh, June 10, 1872, for the withdrawal of the Toledo work, with the release "O" of Swan, Rose & Co. endorsed upon it. *There is no reference to the paper "E" signed by Hickox at Pittsburgh on the same day.* It was not presented by Hickox to the board; *on the contrary it was suppressed by him.*

The bill of exceptions also contains the following:

"The defendants, further to maintain the issue on their part, gave in evidence to the jury the official record of the proceedings of the Board of Directors of the Mansfield, Coldwater and Lake Michigan Railroad Company, from the date of the consolidation, for the purpose of showing thereby that the said paper known as release 'E,' had never been brought to the attention of said board, and that said board had never taken action thereon. It appeared from said record that thirteen

directors of said consolidated company had been elected by the stockholders thereof at Coldwater, Michigan, on May 10th, 1871, namely: W. S. Hickox, Hubbard Colby, James H. Cook, Andrew L. Grimes, B. Burns and Henry H. Sturges, all of Mansfield, Ohio; and Henry C. Lewis, J. G. Parkhurst, F. V. Smith, Joseph S. Youngs, Joseph Fisk, Victory P. Collier, and B. B. Skinner, of Michigan. That upon the same day the said Board of Directors organized and elected Willard S. Hickox, President; Henry C. Lewis, Vice-President; Henry C. Hedges, Secretary; John S. Youngs as Assistant-Secretary; D. B. Dennis, Treasurer, and H. H. Sturges, Assistant-Treasurer.

"The said board appointed the following stockholders, the Executive Committee of the first (Ohio) division of said railroad, under section nine of the articles of consolidation, namely: W. S. Hickox, H. Colby, A. L. Grimes, J. H. Cook, H. H. Sturges, H. C. Hedges, B. Burns, J. H. Reed, and B. B. McVay. No new Board of Directors of said consolidated company, was elected until January 6, 1873.

"There was nothing in the said record of the official proceedings of said Board of Directors of said consolidated company showing that said release 'E' had ever been brought to its attention or that it had ever acted upon it" (Rec., pp. 117-18.)

It appears from the oral testimony, also, that the paper "E" was never presented to the Board of Directors of the consolidated company. It was presented at a meeting of the Ohio Executive Committee, January 4, 1873, several months after the plaintiffs had abandoned the work (See Rec., p. 738, side page, 875; also p. 662, side page 748; also p. 667, side pages 757-8; also pages 679-80; also pages 701-2; also page 767, side page 922.)

There is absolutely no evidence contradicting this showing. No action was taken upon the paper when so presented. (Testimony of H. H. Sturges, page 767, side page 923.)

Two days after the paper had been laid before the Ohio executive committee by Hickox, the stockholders met for the first time after the certificate of consolidation had been filed with the Secretary of State, and elected a board of directors. The board so chosen re-elected Hickox president. It was claimed on the trial by counsel for plaintiffs that this amounted to a ratification of the act of Hickox in signing the paper "E."

The amount of the consideration released by the paper "E" was a mere bagatelle compared with the actual cost of the work withdrawn, or the amount that would have been paid for it under the contract. It embraced the heaviest work of the line. It included a good bridge across the Maumee at Toledo, which would have cost a large sum of money. The averment of the answer is that the work released "was equal in quantity of work and total value of the work to have been performed thereon, to, as near as the same can be stated, forty-one average miles of said railroad, and would have cost said plaintiffs, at the contract price, over two hundred and fifty-six thousand two hundred and fifty dollars to construct that portion of said railroad as stipulated in said original contract." (Rec., p. 45.)

This averment of the answer is fully borne out by the evidence. (See the testimony of Latcha, Rec., pp. 612-18; of Dowling, pp. 641-2; of Hamilton, pp. 705-8; of Marston, pp. 713-20.) Even John Swan puts the probable cost at $150,000 to $160,000 (Rec., p. 828; side page 1021): and his witness, Engineer Andrews, places it at $50,000 a mile or more. (Rec., p. 141, cross-examination.)

The amount released by the paper "E" was $40,000 in cash, and $88,000 in stock. The stock, as the testimony shows, had but a nominal value. The jury, in their verdict, found the money value of $254,000 of the stock at the time the plaintiffs ceased work in October, 1872, including

interest for nearly nine years, to be $35,339.10. Ten thousand dollars would be a high estimate of the value of the stock; this added to the $40,000 in cash released would make $50,000 only; showing a loss to the company in this transaction of over two hundred thousand dollars.

For the purposes of the present controversy, however, it is not material to show with any degree of accuracy the extent of the loss sustained. It is sufficient if it appear that it was substantial. Under the release "O" of Swan, Rose & Co., which was approved in October, 1872, it was stipulated that Swan, Rose & Co. "hereby release all claims for work done, *or to be done*, or for contracts between them and the first parties, or either of them, under which they, the undersigned, were to have constructed said road from Dayton and Michigan tangent, at or near Toledo, to and through said city, and beyond the same to the State line of Ohio and Michigan." The proper construction of this release, when taken in connection with the original contract, is plain. The original agreement to pay $6,250 per mile in stock and cash, was an agreement to pay so much for the entire work as might be ascertained by multiplying the number of miles of road to be constructed by the price to be paid per mile; it was an entire contract to build the entire road, and a price was to be paid for the entire work, to be ascertained in the manner above stated. See 1 Story on Contracts, 5th edit., p. 24, and cases; 2. Parsons on Contracts, 5th edit., pp. 518–519; also, *Clark* v. *Baker*, 5 Metc., p. 452; *Osborn* v. *Hartford*, 38 Conn., p. 290; *Baker* v. *Higgins*, 21 N. Y., p. 397; *David* v. *Maxwell*, 12 Met., p. 286. The work was to be paid for as it progressed, upon estimates made, not for any one mile of the road, nor for any one section, which might or might not correspond to a linear mile, but for the quantity of work done each month, and necessarily in the proportion that the quantity done bore to the whole work to be done. At the time release "O" was executed, estimates had been made and paid in this manner, and upon this basis. And it results mathematically that by release "O" Swan, Rose & Co. released from the contract price of the whole work so much of that contract price as they would have been paid for the Toledo work had they done the whole work, including the Toledo work. They released just so much of the contract price as they would have been paid for the Toledo work had they done that work. And, in so far as the paper "E" changes this rule of compensation by reducing the proportion of the consideration released, just so far is the company prejudiced by the unauthorized act of Hickox here complained of.

Upon this branch of the case counsel for defendants requested the court to charge the jury as follows:

"10. The proper method of arriving at the amount due for work done under the contract would be to ascertain what proportion it bore to the whole amount Swan, Rose & Co. contracted to do, and then give the plaintiffs the same ratio or proportion of the contract price as they had performed of the work.

"11. On the 10th of June, 1872, an arrangement was made between the Pennsylvania Company, the Toledo, Tiffin and Eastern Railroad Company and the defendants, whereby the defendants were relieved by the Pennsylvania Company from building that part of the line from the tangent point of the curve of the Dayton and Michigan Railroad through the city of Toledo, and north to the Ohio line, which included the bridge over the Maumee river at Toledo; and Swan, Rose & Co., upon the back of the same contract, approved and assented to that contract and released all claim for work done, or to be done by them, on that part of the road under their construction contract with the defendants, but providing that the release was not to affect that contract any further than it was applicable to that portion of the line which the Pennsylvania Company thereby agreed to construct; in all other respects the construction contract of Swan, Rose & Co. was to remain in full force. This paper has been called release 'O.'

"12. The execution of this release 'O' and the contract with the Pennsylvania Company upon which it was endorsed is admitted by all parties in this action. Its construction and effect, therefore, becomes a matter for the court to determine.

"13. By that transaction termed release 'O,' Swan, Rose & Co. waived and released 'all claim for work done, or to be done,' upon that part of the line mentioned in it. The effect of this release was to take out of the contract sued on, so much of the contract price to be paid by the defendants as went into the contract by reason of that seven miles being put into the contract originally.

"14. The promise to pay for work done on this part of the line, as well as upon the rest of it, was dependent upon the work being done. The price was only to be due and payable when the work was done, and releasing the work carried the price with it. So much of cash and stock as this part of the road would have come to, under the contract, when completed, was therefore released with the work under that instrument called release 'O;' this amount may be arrived at in the same way as if the work had been done, but when ascertained it must be deducted from the price to be paid under the contract, unless the paper called release 'E' is to stand.

"15. A correct estimate of the work actually done would give the plaintiffs all they are entitled to recover, so far as the contract sued on is affected by release 'O.'

"16. The plaintiffs, however, claim that a third paper was executed by the railroad company, in connection with the transaction by which this Toledo work was released, whereby the company were only released from the payment of $40,000 of the cash part of the contract, besides certain stock, and that the balance of it, computed at $4,250 per mile, for the entire line, is still due under the contract. This the defendants deny; they deny the authority of Willard S. Hickox, or of any one else, to execute that paper on behalf of the company, and say it is a fraud upon them. The burden of establishing and sustaining this paper called release 'E,' lies upon the plaintffs.

"17. The interest of Willard S. Hickox in the construction of that part of the line covered by release 'E,' assumed and incurred by reason of, and under, his contract to build the same, as shown by exhibit 'D,' attached to the plaintiffs' petition, and the contracts therein mentioned and referred to, rendered him incapable of binding the railroad company by that instrument.

"18. If the above is refused, then Willard S. Hickox was incapacitated from binding the company to release 'E,' without a special authority conferred upon him by the company to do so.

"19. Under the facts stated in the plaintiffs' pleadings in this cause, Willard S. Hickox, as President or otherwise, was incompetent to bind the company by release 'E.'

"20. Under the facts stated in the plaintiffs' pleadings, and disclosed by the plaintiffs' testimony, release 'E' was, and is, void.

"21. Release 'E' is void and of no effect, and the jury will give it no force in arriving at the amount due on the contract sued upon.

"22. If Willard S. Hickox was interested in the construction, was a partner, or was to have a share or portion of the pay under it, he was incompetent to bind the company by release 'E.'

"23. In arriving at the fact of whether or not Hickox was interested as a partner, or otherwise, in the proceeds and benefits to be derived from changing the contract, you should take into consideration all the facts and circumstances disclosed by the evidence in the case bearing upon that point. With the testimony of McLane bearing distinctly upon it, you should consider and weigh the manner of letting the work, the manner of putting the $250 per mile mentioned in the contract, its alleged transfer afterwards to Hickox, either for his own use, or the use of himself and others, and by all acts showing a desire to advance the interests of those who were to be benefited by the contract, if such appear from the evidence in the case.

"24. If Hickox was to receive, either alone or with others, $250 per mile out of the cash part of the price to be realized and obtained under the contract, then he was incapacitated and incompetent to bind the company by any contract whereby the work to be done under the contract would be lessened, or the pay for the work done would be increased or easier obtained.

"25. If any others than Hickox, or with him, were interested in the profits or pay to be realized and obtained under the contract, then they, as well as Hickox, were incompetent to make a release.

"26. If Hickox alone, or with other directors, was interested in, and to have $250 per mile of the cash to be realized under the contract sued upon, neither Hickox or those interested with him could by any acts of theirs ratify the execution of the paper called release 'E.'

"27. Under such circumstances none but the stockholders could ratify it.

"28. A ratification cannot occur until the parties ratifying have knowledge of the facts. They must act with knowledge, and the burden of showing such a state of things lies upon the plaintiffs, if they claim a ratification of any unauthorized act of the officers of the company.

"29. If it appear that this $250 cash per mile was assigned and given by Swan, Rose & Co. to Hickox, either for his separate use, or for the benefit of himself and associates on the board of directors, as a payment for favors to be shown the contractors in their dealings with the company, both Hickox and the others would thereby afterwards be incapacitated and incapable of binding the company by any arrangement against the interest of the company to make.

"30. If release 'E' was the result of a fraudulent collusion between Hickox, either acting alone or with others, and Swan, Rose & Co., or either of them, it was, and is, void, and the jury will pay no attention to it.

"31. In arriving at the fact of fraudulent collusion, you must look at all the evidence in the case bearing upon that fact. This fact may be inferred and found by you from circumstances, and need not be established by direct evidence. Among the circumstances to be weighed, are the manner of letting the contract, the manner of making the bid, the alleged change in the amount to be paid for the work, and why it was done; the subsequent transfer of $250 cash per mile of it, and the purpose in doing it; the taking of McMann into the partnership, as claimed by the plaintiffs, and why this was done, and his relationship to the president of the company; the transaction in regard to the extra work claimed; and the alleged concealment by Hickox of his letter in regard to it; the manner of obtaining the release mentioned by Swan, Rose & Co.; the alleged false representation as to its contents, and effect of it, to the other directors and officers upon his arrival at Mansfield; his alleged concealment of it afterwards from the company officers until several months after its execution; the terms of the instrument itself, and the amount of work released as compared with the price released; the obligation the company was under to make any such concession, and by all other acts and facts shown by the evidence in the case bearing upon the question.

"32. The same rules of law above mentioned applying to the acts of Hickox, or his associates, about the execution of release 'E' and his competency to execute it, apply to his alleged promise to pay for the so-called extra work. If he could not bind the company by release he was also incapacitated to bind it by any assurance he could make the contractors about extra work.

"45. The Executive Committee of Ohio could not either by action, by non-action, or by silence ratify the execution of release 'E' if they were interested in the contract adversely to the company; and if, under the arrangement made with the contractors they were to share in the pay to the extent of $250 cash per mile for the work done under the contract, they were so interested in it that they could not ratify release 'E.'

"46. If the Executive Committee had been bought up or bribed by the plaintiffs, in the transaction whereby the $250 cash per mile was transferred and taken out of Swan, Rose & Co's. hands, they were afterwards incompetent to either authorize, make or ratify the execution of release 'E,' and neither their action nor silence could in any way ratify it in such emergency.

"49. None of the stockholders, or members of the Board of Directors, not interested with Hickox and his associates in the $250 per mile transaction, can be charged with knowledge or notice of matters coming to the notice or knowledge of Hickox or his associates, if they were interested in the profits to be obtained for the work.

"50. No ratification by the directors or stockholders is complete, or of any force, unless it is done with knowledge of the circumstances under which the act claimed

to be ratified was done, and of the obligation the ratification would impose upon them.

Counsel for defendants request the court to further instruct the jury as follows:

The contract between the Pennsylvania Company, the Mansfield, Coldwater and Lake Michigan Railroad Company, and the Toledo, Tiffin and Eastern Railroad Company, of June 10th, 1872, by which it was stipulated that the Pennsylvania Company should do so much of the work provided for in contract "A" of the petition, as was to be done by Swan, Rose & Co., from the tangent point of the curve of the Dayton and Michigan Railroad, through and within the city of Toledo, to the State line of Ohio and Michigan, for the consideration named in said contract of June 10th, 1872, together with the assent thereto of Swan, Rose & Co. endorsed thereon, operated as a release to the said Swan, Rose & Co., by said Mansfield, Coldwater and Lake Michigan Railroad Company of all obligation to do that part of said work lying between said curve and said State line; and the said release of Swan, Rose & Co., taken in connection with the said contract of June 10th, 1872, upon which the same was endorsed as aforesaid, operated as a release to said Mansfield, Coldwater and Lake Michigan Railroad Company, by said Swan, Rose & Co., of so much of the contract price named in said contract "A" as the said Swan, Rose & Co. would have been entitled to receive for said portion of said work so released, had they performed the same under said contract. And any subsequent stipulation between said Swan, Rose & Co., and said Mansfield, Coldwater and Lake Michigan Railroad Company, purporting to fix any other or different measure of the compensation or allowance to said Swan, Rose & Co., on account of the release of said portion of said work, unless some new consideration in respect thereto moved between the parties, would be without consideration and not binding upon either of the said parties thereto.

Also, if the paper known as release "E" shall be held binding on said Mansfield, Coldwater and Lake Michigan Railroad Company, then in law, its operation is prospective only. It can have no effect upon the rights of the parties as to work done, estimated, accepted and paid for by said railroad company prior to the date of said supposed release; but it is to be adopted as a measure of compensation for such work only as was performed by the plaintiff after the said date thereof." (Rec., pp. 119–124.)

These requests were not given to the jury. In some particulars their correctness was recognized in the charge given; in others not. The defendants excepted to the refusal to give the instructions requested, and also specifically to the following portions of the charge as given:

The defendants, severally, by their respective counsel, at the time the said charge was given as aforesaid, excepted to so much thereof as reads as follows: "Therefore it was deemed important to the Mansfield, Coldwater and Lake Michigan Railroad Company, as well as to the old organization, that there should be some other arrangement made, by which the compensation of Swan, Rose & Co. should be settled, by either a new contract or a release; thereupon for that purpose such a release was executed, called in this case exhibit 'E,' signed by Willard S. Hickox, as President of the new organization, the railroad company, and delivered over to Swan, Rose & Co. If that release is a valid obligation between the parties, then it settles the price with Swan, Rose & Co. for the work already done, and wipes out from consideration in any form either the manner of performance, or the amount of compensation, and literally wipes out that seven miles from the original contract; and you are only to consider the contract as to the remaining portion of the road—the 164 miles."

Also to so much thereof as reads as follows:

"But I direct you, additionally, that if there was a fraud in the original contract, that that fraud cannot be transferred to a subsequent release, unless you are satisfied from the proof that it was their intention to have that original contract operate as a fraud continuously, for we must in this age of civilization give parties an opportunity to repent; for it does not follow that, because a man commits one fraud, that he will continue to commit frauds in the future"

Also to so much thereof as reads as follows:

"And all this you are to examine to determine the fraudulent purposes, and if you find from the evidence that this contract was originally made with an intent to take fraudulent advantages in the future in subsequent alterations and releases, then

you will consider subsequent releases and alterations of the contract as void. But if you do not so find then you will consider them valid."

Also to so much thereof as reads as follows:

"They may authorize this Executive Committee to transact all the business that the Board of Directors themselves are authorized under the law to transact."

Also to so much thereof as reads as follows:

"It is claimed on the part of the plaintiffs that after Swan, Rose & Co. had that release in their possession that the President, Mr. Hickox, met his Executive Board at home and presented to them this contract, this release; the evidence, as I understand it does not determine very definitely whether they took any action on that at all,—whether they failed to ratify it, or entirely and expressly refused to ratify it; but I direct you, gentlemen, that if this release was laid before the Executive Board and it had an opportunity to repudiate the release, but did not repudiate it, it is to be regarded as an implied ratification of the contract. That is the rule where an officer acts as an agent of the corporation."

Also to so much thereof as reads as follows:

"Another matter in this connection; of this Executive Board, three members were not directors of the company, and six were directors; the three members not directors represented the stockholders. You are to look into the evidence, gentlemen, to determine what the meeting of the stockholders did a short time afterwards; and perhaps there is no evidence that these members of the Executive Committee were there; but whether they were or not you will look into the evidence to determine whether the stockholders had any knowledge of, or took any action on this release. I believe that Mr. Hickox, and all the other officers of the corporation were re-elected; but the mere re-election of Mr. Hickox as President, would not amount to a ratification of this contract, which he made without authority of the Board of Directors, but you will look into all the evidence to determine whether there was a ratification, though in this connection I will say that the circumstances of his re-election may be considered by you to determine this question of ratification." (Rec., 137-8.)

The defendants, also, at the same time severally excepted to the charge as a whole upon the ground that it was calculated to mislead the jury. (Rec., p. 139.)

The objections to the paper "E" rest upon the following grounds:

First: Independently of the limitation on his power contained in the by-laws, Hickox, as president of the company, had no authority to bind the company by executing it.

Second: The by-laws provided that the president might enter into such agreements as should be ordered by the board, or as should be in accordance with the policy of the company, "*but subject to the approval of the board.*" Third persons were bound to take notice of this limitation upon the power of the president.

Third: Hickox was disqualified from binding the company by the execution of the paper referred to, for the reason that he was personally interested in the principal contract; certainly by the assignment to him of the $250 per mile of the cash part of the consideration, if not as a secret partner; and this interest was known to the plaintiffs. He was also interested by reason of the responsibilities imposed upon him by the contract known as exhibit "D" of the petition.

Fourth: The execution of the paper "E" was not made known to the Ohio Executive Committee appointed under section nine of the articles of consolidation until the meeting held January 4, 1873. At that meeting they took no action upon it. By said article nine the "Executive Committees shall severally have the general control and management of all business pertaining to the interest of said road, within their respective divis-

ions and States until the road-bed shall be fully prepared and ready for the iron, *subject to the Board of Directors.*" (Rec., p. 144, side page 395) The power conferred by this article could not be delegated to a sub-committee.

That a trustee, agent, or director, who is interested, is disqualified from acting, is a proposition so well settled that it is hardly necessary to cite authorities in its support.

Dens on Railways, p. 54; *People* v. *Township*, 11 Mich., 225; *F. & P. M. R. R. Co.* v. *Dewey*, 14 Mich., 478; *Port* v. *Russell*, 36 Ind., 60; *Paine* v. *L. E. & L. Ry*, 31 Ind., 283; *Atcheson* v. *Mallon*, 43 N. Y., 147; *Woodworth* v *Bennett*, 43 N. Y. 273; *Michoud* v. *Girod*, 4 How. U. S. 552-3; 1 Redfield on Railways, 577, and notes: *E. & N. A. R. R. Co.* v. *Poor*, 59 Maine, 277; *Goodin* v. *Cincinnati*, 18 Ohio St., 169; *Rolling Stock Co.* v. *Railroad*, 34 Ohio St., 450; Field on Corporations, Sec. 176, and cases in note: *Wardell* v. *Railroad Company*, 103 U. S. (13 Otto,) 651; *Duncomb* v. *R. R. Co.*, 84 N. Y., 190; S. C. 4 Amer. & Eng. R. R. Cases, 293, and notes, p. 306.

The general doctrine on the subject of ratification is thus summed up by the Messrs. Abbott, in their Digest of the Law of Corporations, page 674, Sec. 18, and page 675, Sec. 20:

"When it is attempted to maintain a contract against a corporation upon the ground of a corporate ratification of the acts of their agents (originally unauthorized) in making it, it must be shown that the resolution or acts of the corporation, or of the directors, etc., relied on as constituting a ratification, *were performed with a full knowledge of all the material facts necessary to an understanding of their rights. Blen* v. *Bear River, etc. Co.*, 20 Cal., 602; *Cumberland Coal, etc., Co.* v. *Sherman*, 20 Md. 117; *Green* v. *Mayor, etc.*, 4 Rob. (*N. Y. Sup. Court*), 675; *Pennsyl. etc., Co.* v. *Dandridge*, 8 Gill & Johnson, 248."

See, also, *Rolling Stock Co* v. *Railroad*, 34 Ohio St., 450.

In declining to instruct the jury as requested by us, therefore, the Circuit Court erred. I particularly object to that part of the charge as given in which the court say to the jury that the fraud in the original contract can not be transferred to a subsequent release unless the jury are satisfied from the proof that it was the intention to have the original contract operate as a fraud continuously. If a fraud was knowingly, intentionally and deliberately practiced upon the company in the execution of the original contract, and Hickox, or any member of the board of directors, thereby acquired interests adverse to the company, of what moment is it to inquire as to whether or not, at the time of the commission of the original fraud, there existed an intention to commit further frauds? It was a question of the *power* or *capacity* of the president or director to act, invested as he fraudulently was with an interest which had never been relinquished; and the original fraud, with the circumstances attending it, reflected light upon the subsequent transactions of Hickox, when, being interested as he was with the plaintiffs, and in a measure in their power, he committed the grievous wrong upon the company and its stockholders now complained of.

Of the same tenor of the instruction above noticed is that embodied in the following language: "If you find from the evidence that this contract was originally made with an intent to take fraudulent advantages in the future *in subsequent alterations and releases*, then you will consider subsequent releases and alterations of the contract as void. *But if you do not so find, then you will consider them valid.*"

Here we have it in plain, unmistakable terms. No matter how fraudulent the original transaction was by which Hickox, and possibly other men-

bers of the directory, became, and continued to be, interested in the contract to the extent of between forty and fifty thousand dollars: If they did not, at the time of the commission of the original fraud, intend to take fraudulent advantages in the future in subsequent alterations and releases, then any subsequent alterations and releases made by them are valid. I submit that there is manifest error in this instruction.

I insist also that the court erred in instructing the jury, as it did, that the board of directors might authorize the "executive committee *to transact all the business that the board of directors themselves are authorized to transact.*" No such surrender or delegation of the powers of a board of directors is permitted. The directors are the chosen agents and trustees of the stockholders, and it is not permitted to them to absolve themselves from the discharge of the duties imposed upon them by law by a delegation of their powers to others (See Angell and Ames on Corporations, Secs. 279, 291, 508, 512; Morawetz on Corporations, Sec. 249; Story on Agency, Sec. 13; *Rollins* v. *Phelps*, 5 Minn., 463; *Jewett* v. *Alton*, 7 New Hamp., 253; *Gillis* v. *Bailey*, 1 Foster's New Hamp., 149.)

But proceeding upon the idea that the board might delegate and the executive committee exercise, the powers of the board, the court further said: "It is claimed on the part of the plaintiffs that after Swan, Rose & Co. had that release 'E' in their possession that the president, Mr. Hickox, met his executive board at home, and presented to them this contract, this release; the evidence, as I understand it, does not determine very definitely whether they took any action on that at all—whether they failed to ratify it, or entirely and expressly refused to ratify it; but I direct you, gentlemen, *that if this release was laid before the executive board, and it had an opportunity to repudiate the release, but did not repudiate it, it is to be regarded as an implied ratification of the contract.* That is the rule where an officer acts as an agent of the corporation."

How is it possible to sustain this instruction? Bear in mind that the meeting of the executive committee referred to took place January 4, 1873, more than two months after the plaintiffs had abandoned the work; that it was a meeting of the committee only, and *not* a meeting of the board of directors; that by the articles of consolidation the committee was placed under the supervision of the board of directors; and yet the jury were told, *as a matter of law*, that if the committee had an opportunity to repudiate the release, but did not repudiate it, *it was to be regarded as an implied ratification of the contract.* The jury were not directed to inquire into the facts or circumstances existing at the time, nor to determine whether or not the situation was such as to call for speedy action on the part of the committee; but they were pointedly told that a failure to repudiate at the first meeting at which the paper was laid before them, amounted in law to a ratification.

I claim that the company would not have been bound by an *express* approval by the committee, as this power could only be exercised by the board of directors; for a much stronger reason the company would not be bound by a ratification *implied* from a failure of the committee to repudiate under the circumstances stated by the court.

The court erred also in instructing the jury, as it did in effect, that they might consider the re-election of Mr. Hickox to the presidency of the company on January 6, 1873, as tending to establish a ratification. There was no testimony tending to show that the stockholders, or any directors outside

of the Ohio committee had any knowledge, at the time of that election, of the paper 'E.'

In this connection it should be observed, also, that the court was entirely silent as to the rule of law requiring that the acts of the directors or other authorities, relied upon as constituting a valid ratification, "were performed with a full knowledge of all the material facts necessary to an understanding of their rights." The jury were not directed to inquire whether the members of the executive committee, at the time they failed to act upon the paper "E," had knowledge of the circumstances under which it was signed by Hickox; and especially whether they were informed as to the enormous disproportion between the consideration released by the paper "E" and that released by the paper "O." The court was expressly requested by the defendants to instruct the jury upon this point. (Requests Number 28 and 50.) The following is all that the court said upon this subject:

"A principal, or board in the position of a principal, could not ratify a contract without knowing what it was. If Mr. Hickox did not allow the executive committee or board of directors to see that contract of release, and become acquainted with its contents, then their neglect to act upon it could not be construed as a ratification." (Rec., p. 130, side page 358.)

It will be seen that this does not meet the point at all. It relates simply to a knowledge *of the contents of the paper;* not to a knowledge of the circumstances under which it was obtained, or to the ruinous sacrifice it entailed upon the company. And the court further said:

"All these general propositions that have been handed me by the defendants' counsel that are not in accordance with what I have said may be considered as refused." (Rec., p. 135, side page 372.)

Neither did the court in any manner allude to the disability to act attaching to Hickox by reason of his interest in the subject matter of the original construction contract under his personal contract known as Exhibit "D" of the petition. (Rec., p. 21.) The contract "D" reads as follows:

Exhibit "D."

This memorandum witnesseth: That the Baltimore and Ohio, Toledo and Michigan Railroad Company, so far as it is concerned in the premises, agree to give unto Willard S. Hickox all the consideration and benefits which may accrue to it under the contract by which the trustees of the Toledo and Woodville Railroad agree to give or pay unto said company and the Mansfield, Coldwater and Lake Michigan Railway Company for the construction of the Toledo and Woodville Railroad, and the said Baltimore and Ohio, Toledo and Michigan Railroad Company further agree to give one hundred and twenty thousand dollars subscribed to its capital stock, and also three hundred and fifty thousand dollars additional stock to be issued to him in the premises.

For which he agrees to construct the road and comply with the terms and conditions and obligations imposed upon the said Baltimore and Ohio, Toledo and Michigan Railroad Company, and the Mansfield, Coldwater and Lake Michigan Railway Company, by the contract with the trustees of Toledo and Woodville Railroad, and its connecting railroad from Woodville to Tiffin, and Mansfield via Tiffin, and for certain work from the northeast line of Toledo to the State line, bearing date May 4th, 1871.

And it is also agreed that the said Willard S. Hickox shall have the right to underlet the said work to such party as he may deem advisable, and the Baltimore and Ohio and Toledo and Michigan Railroad Company agrees to accept of such party in lieu of said Hickox and release him from liability in the premises, provided said Hickox shall provide in the contract for underletting the same that the stockholders shall not be held liable under the individual liability clause of the constitution and laws of Ohio beyond the payment of the stock subscribed by them severally in the premises, and such contractor be acceptable to the board of directors.

The said Hickox hereby assents that the said board of the Baltimore and Ohio and Toledo and Michigan Railroad Company may issue an additional amount of fifty thousand dollars to defray the expenses incurred by said board, and in addition to the sum of twenty-eight thousand dollars heretofore reserved to pay expenses, and an amount which may be necessary to pay for right-of-way and depot grounds, which have or may be contracted for by said company. This agreement is intended to apply to all real estate which may have been purchased to secure the right-of-way and depot grounds more than is necessary to be used therefor, especially the lots on the west side of Summit street. Two hundred thousand dollars of said three hundred and fifty thousand dollars is considered as an additional consideration for building the Toledo and Woodville Railroad and Maumee river bridge.

WILLARD S. HICKOX.

Baltimore and Ohio, Toledo and Michigan Railroad Company,

By S. A. HALL,
JNO. D. LOOMIS,
JNO. F. HUSS,
} *Committee.*"

By this contract Hickox bound himself personally, among other things, to construct that portion of the line of railroad which was withdrawn from the contract of the plaintiffs by the arrangement of June 10, 1872. He was therefore personally and directly interested in the matter.

The court was requested to give the following instruction to the jury:

"17. The interest of Willard S. Hickox in the construction of that part of the line covered by release 'E,' assumed and incurred by reason of, and under his contract to build the same, as shown by exhibit 'D' attached to the plaintiffs' petition, and the contracts therein mentioned and referred to, rendered him incapable of binding the railroad company by that instrument." (Rec., p. 120.)

This instruction was refused by the court, and the defendants excepted.

3. The Circuit Court also erred in refusing to instruct the jury, as requested by counsel for defendants, as to the effect to be given, in ascertaining the amount earned by the plaintiffs, to the monthly estimates made by the engineers.

The contract "A" contains the following provision:

"It is further expressly agreed, and understood that said work shall be done and performed under the direction, control and to the satisfaction and acceptance of the Chief Engineer of said company, on the part of the Mansfield, Coldwater and Lake Michigan Railway Company, and in consideration of said work said company agrees to pay said Swan, Rose & Co., the sum of $6,500 per mile, payable as follows: $2,000 in stock as herein before provided, per mile, but which stock is hereby reserved and retained by the company until the completion of the whole work, and the $4,500 in cash is to be paid in monthly estimates as made and estimated by the Chief Engineer for work then done and performed." (Rec., p. 15.)

Monthly estimates were made as above provided for. They were put in evidence and are contained in the record, pages 189 to 236 inclusive. These estimates were paid, as shown by the receipts attached to them, which were also put in evidence. (Rec., pages 189, 190, 192, 196, 199, 202, 205, 208, 211, 214, 217, 220 and 222.)

As to manner of making up these estimates, see the testimony of the engineer, Grimes, page 799, side page 976; page 800; pages 800 to 806; testimony of Chief Engineer Gleason, page 541, side pages 538–540; also page 577, side pages 601–608; testimony of Engineer Evans, page 645, side pages 720–724; and pages 655–659.

Upon this state of the evidence, counsel for defendants requested the court to instruct the jury as follows:

1. "The plaintiffs in this cause seek to recover of the defendants for certain work done, and materials furnished by them in building the defendants' railroad

under a contract made between them, dated May 10th, 1871, and also for work claimed to have been done outside of this contract by them, denominated 'extra work.'

2. "Defendants do not deny, but admit, the execution and binding force of the contract mentioned, upon the defendants, so far as it binds them to pay $6,250 per mile for the work, but they deny that any work whatever has been done by the plaintiffs outside of the written contract mentioned, and which was not fairly included in its terms reasonably construed.

3. "The plaintiffs only claiming of the defendants $6,250 per mile whereof $4,250 is in cash and the balance in stock of the company, for work done under the contract, the sum due the plaintiffs under that instrument must be estimated and arrived at in the manner and method provided by the instrument itself, unless some valid reason exists for not doing so.

4. "The contract required the work to be done under the direction, and to the satisfaction of the chief engineer of the company, and the payments of each were to be paid in monthly estimates as made and estimated by the chief engineer, for work then done and performed, but the stock was to be reserved and retained by the railroad company until the completion of the whole work.

5. "It is not disputed, but it is admitted, that a large amount of work was done, and materials furnished by the plaintiffs, upon and in the construction of the defendants' line of road, which was accepted by the railroad company through its engineer, and by this officer estimated from month to month, as the work progressed, and that these estimates were paid in cash by the railroad company, and the money accepted by Swan, Rose & Co., being received in payment of these estimates, and their receipts given therefor.

6. "The amount of cash then paid by the defendants and received by the plaintiffs upon these estimates is $513,197.97.

7. "The estimates actually made by the engineers of the company, as computed by them, do not show that any greater sum was, or is due from the defendants for work done under the contract by the plaintiffs than the sum they have paid thereon, viz: $513,197.97.

8. "The plaintiffs claim, however, that more money is due them for that work and material, but the defendants deny this. Before the plaintiffs, therefore, can recover more of the cash part of the price mentioned in the contract, than the sum mentioned, it is incumbent to establish the liability and fact by a fair preponderance of evidence, and unless they have done this, you cannot find more is due the plaintiffs out of the cash part of the contract than as above admitted.

9. "These estimates are to be tested by their correctness; being the kind and quality of proof contracted for and agreed upon by the parties, they are *prima facie* correct, but not conclusive upon that fact; unless it appears to you, therefore, by a fair preponderance of the evidence, that they are incorrect, you will assume that these estimates are correct, and that the plaintiffs are not entitled to any more money or pay, out of the cash part of the contract, than appears by those estimates, for the work done and material furnished by the plaintiffs, under the contract as originally made." (Rec., pp. 118-19.)

The court not only refused these instructions, but omitted to say anything to the jury on the subject to which they related.

The authorities fully support the correctness of the foregoing requests. The action is brought to recover for work done under the express contract. It is based upon that contract, and the proof required by it to enable the plaintiffs to recover for work done under it, must be produced, so long as it is attainable, or the plaintiffs cannot recover. The skilled judgment of the engineer upon the character and quantity of the work done was contracted for as a condition precedent to payment therefor. The rule is without exception that where parties, by their contract, fix upon a mode by which the amount to be paid upon it shall be ascertained, payment can not be compelled of the amount claimed until the kind of evidence required by the contract is produced; or when it is to be done to the acceptance or satisfaction of a third party, the fact that it was done to the acceptance or satisfaction of

such person must appear before a recovery can be had, at least so long as such proof can be obtained. And this must be averred and proved on the trial. *Smith* v. *Briggs*, 3 Denio, 73; *Butler* v. *Tucker*, 24 Wend., 447; *U. S.* v. *Robeson*, 9 Peters, 319; *McAndrews* v. *Santer*, 7 Abb. Pr. N. S., 408; *Martin* v. *Leggett*, 4 E. D. Smith, 255; *Ranger* v. *G. W. Ry.*, 5 H. Lords, 72; *Adams* v. *Mayor*, 4 Duer. 95; *Smith* v. *Brady*. 17 N. Y., 173; *Wyckoff* v. *Meyers*, 44 N. Y., 143; *Vanderverker* v. *Vt. Cent. Ry.*, 27 Vt., 130; *Herrick* v. *Vt. Cent. Ry.*, 27 Vt., 673; *President* v. *Pa. Coal Co.*, 50 N. Y., 250; 2 Sutherland on Damages, 520, 521.

If the contractor acquiesce in a particular construction of his contract, and allow his estimates from time to time to be made upon such basis, he will be bound by such construction thereafter. *Kidwell* v. *B. & O. Ry.*, 11 Grattan, 676; *Com.* v. *Clarkson*, 3 Penn. St., 277; *Merrill* v. *Ithica & O. Ry.*, 16 Wend. 586; *St. Louis G. Co.* v. *St. Louis*, 46 Mo., 121; *Barker* v. *Troy R. R.*, 27 Verm., 766; *Chicago* v. *Vosburg*, 45 Ill., 311; *Boody* v. *Rutland*, 3 Blatchford, 25.

It is not claimed however, that these estimates are conclusive, but simply that they are *prima facie* correct; and the court was asked to so instruct the jury. See *Memphis, &c., R R. Co.* v. *Wilcox*, 48 Pa. St., 161; *Herrick* v. *Vt. Cent. Ry.*, 27 Vt., 673; *Kidwell* v. *B. & O. Ry.*, 11 Grattan, 676; *Alton Ry.* v. *Northcott*, 15 Ill., 49; *Dubois* v. *D. & H. Canal Co.*, 12 Wend., 334; *Com.* v. *Clarkson*, 3 Pa St., 277; *M. & S, Ry.* v. *Veeder*, 17 Ohio, 385; *Palmer* v. *Clark*, 106 Mass., 373, 389.

4. The court erred in its instruction to the jury in respect to the sufficiency of the demand of the plaintiffs for the delivery of the stock claimed by them.

By the terms of the contract the $2,000 per mile to be paid in stock was "reserved and retained by the company until the completion of the whole work." (Rec., p. 15, side page 41.)

Upon the trial the plaintiffs insisted that they had made a proper demand for the stock, and that it had not been delivered. The jury included in their verdict $35,339.10, as the cash value (interest included) of the stock found to have been earned.

The demand principally relied upon by the plaintiffs to establish their right to a money recovery for the stock, is contained in their letter of October 23, 1872, addressed to Henry C. Hedges, Esq., Secretary of the company. This letter is as follows:

Exhibit "D."

OCTOBER 23d. 2.

"HENRY C. HEDGES, ESQ.,

Secretary Mansfield, Coldwater and Lake Michigan Railroad Company, Mansfield, O.

"DEAR SIR:—Your letter dated October 8th (postmarked October 19th), was received by us on the 21st inst. In reply to your notification to us therein, to proceed at once and comply with our contract with your company, we have to say, as we have frequently said before, that we are ready and anxious (as we have all along been) to comply with the contract on our part, and will go on and complete the work under the contract, upon the company's now complying with *its* part of the contract and paying what it admits is due us for work long since done thereunder; but while the company is so largely in arrears in its payments, and claims that it has no means, present or prospective, with which to pay us, either the money past due or the amount

that would become due on the completion of the work, we must decline to go further with the same.

And we now ask for *immediate* decision and action on the part of the company, or a speedy *settlement* of all our claims under the contract.

Very respectfully yours,

SWAN, ROSE & CO."

(Rec., pp. 182-3.)

This letter was written at Cleveland, and came to the company at Mansfield through the mails. It contains nothing indicating to the company that an issue of stock was desired. And if a demand of this kind had been intended it should have been made at the office of the company at Mansfield. The company was under no obligations to transmit stock certificates through the mails. Upon this part of the case the defendants requested the court to instruct the jury as follows:

38. "The letter written from Cleveland October 23, 1872, by the plaintiffs, or their attorneys for them, to the secretary of the railroad company, does not constitute a sufficient demand for the stock to allow the plaintiffs to recover the value of it in this action.

39. "No sufficient demand was made by the plaintiffs for the stock, to authorize them to recover its value in this action." (Rec., p. 122.)

The court refused to comply with this request, but on the contrary instructed the jury as follows:

"It is claimed on the part of the defendants that the demand must have been made at the office of the company or at least where the stock of the company was issued; but I direct you, that if there was a letter written to the company, or its secretary, properly addressed to such secretary, and deposited in the mails that that would be sufficient to constitute a demand. You have heard the evidence on that subject; and if it appears to your satisfaction that there was such a demand made, or that there was such a letter sent as has been offered in evidence, it may in law amount to a demand so as to authorize these plaintiffs to recover for said stock; without a demand they are not entitled to recover anything for the stock. When they quit work, if they had wanted the stock issued, it was their duty to demand it, though such demand need not have been a specific demand." (Rec., p. 134.)

To all which the defendants excepted. (Rec., p. 139, side page 382.)

The defendants also excepted to the following portion of the charge upon this subject:

"Now, I direct you that a general demand of payment by the plaintiffs without specifying this stock would be sufficient to include the stock, and enough to authorize a recovery of the stock, or the value of the stock earned by the plaintiffs in this suit." (Rec., p. 139.)

That the failure of the company to respond to the letter written and mailed at Cleveland does not entitle the plaintiffs to recover the money value of the stock, is established by the case of *Moore* v. *Hudson River R. R. Co.* 12 Barbour, 156. See opinion of the court at page 157, and the cases there cited. In the course of the opinion, the court say: "This rule arises from the nature of the contract itself. The place of performance is not expressed, but is implied from the character of the thing to be done. Tested by this rule, *the contractors would be bound to present themselves at the office of the company to receive the stock at the hands of the proper officers, whose duties require them to make the necessary entries in the books, and furnish to the stockholders the appropriate written evidence of their rights and interests.* This we consider fairly, if not necessarily, inferrable from the terms of the contract."

such person must appear before a recovery can be had, at least so long as such proof can be obtained. And this must be averred and proved on the trial. *Smith* v. *Briggs*, 3 Denio, 73; *Butler* v. *Tucker*, 24 Wend., 447; *U. S.* v. *Robeson*, 9 Peters, 319; *McAndrews* v. *Santer*, 7 Abb. Pr. N. S., 408; *Martin* v. *Leggett*, 4 E. D. Smith, 255; *Ranger* v. *G. W. Ry.*, 5 H. Lords, 72; *Adams* v. *Mayor*, 4 Duer. 95; *Smith* v. *Brady*. 17 N. Y., 173; *Wyckoff* v. *Meyers*, 44 N. Y., 143; *Vanderverker* v. *Vt. Cent. Ry.*, 27 Vt., 130; *Herrick* v. *Vt. Cent. Ry.*, 27 Vt., 673; *President* v. *Pa. Coal Co.*, 50 N. Y., 250; 2 Sutherland on Damages, 520, 521.

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"DEAR SIR:—Your letter dated October 8th (postmarked October 19th), was received by us on the 21st inst. In reply to your notification to us therein, to proceed at once and comply with our contract with your company, we have to say, as we have frequently said before, that we are ready and anxious (as we have all along been) to comply with the contract on our part, and will go on and complete the work under the contract, upon the company's now complying with *its* part of the contract and paying what it admits is due us for work long since done thereunder; but while the company is so largely in arrears in its payments, and claims that it has no means, present or prospective, with which to pay us, either the money past due or the amount

that would become due on the completion of the work, we must decline to go further with the same.

And we now ask for *immediate* decision and action on the part of the company, or a speedy *settlement* of all our claims under the contract.

Very respectfully yours,

SWAN, ROSE & CO."

(Rec., pp. 182-3.)

This letter was written at Cleveland, and came to the company at Mansfield through the mails. It contains nothing indicating to the company that an issue of stock was desired. And if a demand of this kind had been intended it should have been made at the office of the company at Mansfield. The company was under no obligations to transmit stock certificates through the mails. Upon this part of the case the defendants requested the court to instruct the jury as follows:

38. "The letter written from Cleveland October 23, 1872, by the plaintiffs, or their attorneys for them, to the secretary of the railroad company, does not constitute a sufficient demand for the stock to allow the plaintiffs to recover the value of it in this action.

39. "No sufficient demand was made by the plaintiffs for the stock, to authorise them to recover its value in this action." (Rec., p. 122.)

The court refused to comply with this request, but on the contrary instructed the jury as follows:

"It is claimed on the part of the defendants that the demand must have been made at the office of the company, or at least where the stock of the company was issued; but I direct you, that if there was a letter written to the company, or its secretary, properly addressed to such secretary, and deposited in the mails that that would be sufficient to constitute a demand. You have heard the evidence on that subject; and if it appears to your satisfaction that there was such a demand made, or that there was such a letter sent as has been offered in evidence, it may in law amount to a demand so as to authorize these plaintiffs to recover for said stock; without a demand they are not entitled to recover anything for the stock. When they quit work, if they had wanted the stock issued, it was their duty to demand it, though such demand need not have been a specific demand." (Rec., p. 134.)

To all which the defendants excepted. (Rec., p. 139, side page 382.)

The defendants also excepted to the following portion of the charge upon this subject:

"Now, I direct you that a general demand of payment by the plaintiffs without specifying this stock would be sufficient to include the stock, and enough to authorize a recovery of the stock, or the value of the stock earned by the plaintiffs in this suit." (Rec., p. 139.)

That the failure of the company to respond to the letter written and mailed at Cleveland does not entitle the plaintiffs to recover the money value of the stock, is established by the case of *Moore* v. *Hudson River R. R. Co.* 12 Barbour, 156. See opinion of the court at page 157, and the cases there cited. In the course of the opinion, the court say: "This rule arises from the nature of the contract itself. The place of performance is not expressed, but is implied from the character of the thing to be done. Tested by this rule, *the contractors would be bound to present themselves at the office of the company to receive the stock at the hands of the proper officers, whose duties require them to make the necessary entries in the books, and furnish to the stockholders the appropriate written evidence of their rights and interests.* This we consider fairly, if not necessarily, inferrable from the terms of the contract."

5. The Circuit Court also erred in its instructions to the jury in respect to the counterclaim of the defendants set out in the answer. (Rec., p. 47, side pages 121-2.)

The construction contract contained the following stipulation:

"Said Swan, Rose & Co. further hereby agree to fence on each side of said Toledo and Woodville Railroad, the same with a good and substantial fence, also to fence on each side of the Baltimore and Ohio and Toledo and Michigan Railroad herein contracted for, to be built with a good and substantial fence." (Rec., p. 14; side page 38.)

This part of the work was, by the contract, to be done by April 22, 1872. It was never done.

For this fencing the company was to pay the plaintiffs $50,000 in stock upon its completion. (Rec., p. 15, side page 41.)

At the time the fencing was to be completed, namely, April 22, 1872, (Rec., p. 14, side page 39), there is no pretence of default on the part of the company. A cause of action thereupon arose against the plaintiffs upon the contract to recover the difference between the cash value of the stock at that time and what it would have cost to do the fencing. And this constitutes the counterclaim against the plaintiffs.

The following, taken from the bill of exceptions, shows what was said by the court to the jury in reference to this claim:

"Mr. Scribner—If your honor please, the question of fencing—

"The Court—Gentlemen of the jury, the defendants set up by what we call a counter-claim, or set off, a claim against the plaintiffs for not building the fences along this road. It is claimed on behalf of the plaintiffs in this suit that that part of the contract was rescinded between the parties. Now, look into the proof, gentlemen, and determine if that part of the contract was rescinded. If it was, then the defendants have no right to recover for breach of the contract on the part of the plaintiffs, but if otherwise, if that part of the contract was not rescinded, the defendants are entitled to recover,—that is, if they have built the fence since, whatever it cost them to build it more than the plaintiffs agreed to built it for, and if they have not yet built it defendants will be entitled to recover what the fence will reasonably cost more than what the plaintiffs agreed to build it for.

"Mr. Scribner—On behalf of the defendants, I will ask the court to say to the jury, that they may inquire into the value of the stock at the time at which the plaintiffs were to be paid in stock and allow the defendants the difference between the cost of the fence, and the value of the stock in the market at that time.

"The Court—I would say that I think this fence building affair was something like swapping horses; it would hardly be equitable in making the difference to put these plaintiffs down and force them to receive stock worth only from five to ten cents on the dollar, and then ask to recover as against them the difference between the contract price thus paid in depreciated stock and the cost of the fence. The legal rule is that whatever that stock was worth at the time it was to be delivered, or when the fence was built, is the measure of value; but the fence was never built, and the stock was never delivered, is the difficulty about it; but the question is, what the fair market value of the stock was when the contract was broken, and the difference between that and the cost of the fence at that time, and not at any other time." (Rec., pp. 135-136.)

Counsel for the defendants excepted to so much of this instruction as reads as follows:

"I would say that I think this fence building affair was something like swapping horses. It would hardly be equitable in making the difference to put these plaintiffs

down, and force them to receive stock worth only from 5 to 10 cents on the dollar, and then ask to recover as against them the difference between the contract price thus paid in depreciated stock, and the cost of the fence." (Rec., p. 139.)

It is respectfully submitted that these observations should not have been made to the jury. They were told what the law was, and that the defendants were entitled to recover the difference claimed. But at the same time the jury were informed that the claim of the defendants was inequitable. As a result the jury gave it no consideration.

There are other matters in the record to which I had intended to call attention; but this argument has grown to such proportions that I forbear.

C. H. SCRIBNER,

Attorney for Plaintiffs in Error.